275 N.C. App.—No. 2 Pages 199-422

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AUGUST 30, 2021

MAILING ADDRESS: The Judicial Department
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COURT OF APPEALS

CASES REPORTED

FILED 15 DECEMBER 2020

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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APPEAL AND ERROR

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of the existence of an aggravating factor, but successfully argued on appeal that he did not receive proper notice of the aggravating factor, the Court of Appeals rejected defendant's argument that the case should be remanded for a new sentencing hearing. Defendant could not repudiate part of the plea agreement without repudiating the whole agreement, and therefore the plea agreement in its entirety was vacated and the matter remanded for disposition. **State v. Dingess, 228.**

Trial court—noncompliance with appellate court's prior order—failure to address validity of plea agreement—In a criminal case where the trial court denied defendant's motion for appropriate relief—alleging ineffective assistance of counsel where defendant, an undocumented immigrant, faced deportation after pleading guilty to drug-related charges based on his attorney's advice—without an evidentiary hearing, and where the Court of Appeals subsequently entered an order vacating the trial court's ruling and remanding the case for an evidentiary hearing, the Court of Appeals vacated and remanded the trial court's second order denying defendant's motion because the trial court failed to review, pursuant to the Court of Appeals' order, whether defendant's plea was knowingly and voluntarily entered. **State v. Jeminez, 278.**

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EMBEZZLEMENT

Embezzlement of a controlled substance by an employee of a registrant—failure to instruct jury on definition of registrant—plain error analysis—In a case involving embezzlement of a controlled substance by an employee of a registrant (N.C.G.S. § 90-108(a)(14)) where defendant did not request a jury instruction regarding the definition of "registrant," the trial court did not commit plain error by failing to give such an instruction. Defendant could not show any error which seriously affected the fairness, integrity, or public reputation of judicial proceedings where the instruction given by the court mirrored the statutory language of N.C.G.S. § 90-108(a)(14) and required the State to prove CVS Pharmacy was a registrant beyond a reasonable doubt, and where witness testimony provided sufficient evidence that CVS was a registrant of the State of North Carolina and was authorized to fill and deliver prescriptions. **State v. Woods, 364.**

Embezzlement of controlled substance by employee of registrant—motion to dismiss—sufficiency of evidence that employer is a registrant—In a trial for embezzlement of a controlled substance by an employee of a registrant (N.C.G.S. § 90-108(a)(14)) where two witnesses testified that the employer, CVS pharmacy, was a registrant with several organizations such as the State Board of Pharmacy and the DEA and was authorized to dispense medications—but did not clearly identify

CVS as a registrant of the Commission of Mental Health Disabilities, and Substance Abuse Services under N.C.G.S § 90-87(25)—there was more than a scintilla of evidence which would permit a reasonable juror to conclude that CVS was an entity that was registered and authorized to distribute controlled substances. Therefore, the trial court did not err by denying defendant's motion to dismiss based upon an alleged insufficiency of the evidence to show CVS was a "registrant." **State v. Woods, 364.**

Lawful possession of controlled substance by virtue of employment—motion to dismiss—sufficiency of the evidence—The trial court properly denied defendant's motion to dismiss the charge of embezzlement of a controlled substance by an employee of a registrant or practitioner (N.C.G.S. § 90-108(a)(14))—which defendant based on an alleged insufficiency of the evidence to show she lawfully possessed a prescription obtained by fraud—where the evidence showed defendant was a pharmacy tech for CVS pharmacy, she received an incomplete prescription for Oxycodone along with a $100 bill from an unidentified individual, she accessed the CVS patient portal and completed the prescription with another patient's information, she sent the prescription to the pharmacist to be filled, and once it was filled and placed in the waiting bin she retrieved the fraudulently filled prescription and delivered it to the unidentified individual. Because defendant was allowed to take prescriptions from the waiting bins once they were filled by the pharmacist, she had access to the fraudulently filled prescription by virtue of her employment. **State v. Woods, 364.**

EVIDENCE

Drug possession—field tests and officer lay testimony identifying heroin—plain error analysis—In a prosecution for possession of heroin, which arose from a phone call to police about defendant's possible overdose in a hotel room, the trial court did not commit plain error by admitting into evidence field test results and officer lay testimony identifying the substance found in the hotel room as heroin. Defendant never objected to this evidence at trial, and even if the court had excluded the test results and lay testimony, the State presented ample other evidence that defendant possessed heroin, including defendant's statement to law enforcement at the scene that she had used heroin and the officers' discovery of a rock-like substance resembling heroin and drug paraphernalia typically used for consuming heroin. **State v. Osborne, 323.**

Expert witness testimony—Rule 702—foundation—DNA extraction and analysis—In a prosecution for rape and related charges, the trial court did not plainly err by allowing the admission of expert testimony regarding the DNA profile of a biological sample taken from the six-year-old victim's underwear that matched to defendant, where the expert laid a proper foundation pursuant to Evidence Rule 702(a)(3) regarding the procedures used to extract, analyze, and compare DNA samples. **State v. Coffey, 199.**

Prior bad acts—Rule 404(b)—prior victim—similar acts—In a prosecution for rape, sexual offenses, and kidnapping involving the assault of a six-year-old victim in a church bathroom, the trial court did not plainly err by admitting evidence of a prior incident involving defendant and a nine-year-old girl where there were multiple similarities between that incident and the events for which defendant was charged, and where the trial court gave a limiting instruction restricting the jury's use of the prior

bad act to prove defendant's identity, plan, or scheme in accordance with Evidence Rule 404(b). **State v. Coffey, 199.**

Rule 403—confusion of issues—Alford plea—The trial court did not abuse its discretion in a prosecution for multiple sexual offenses against a child by excluding evidence under Evidence Rule 403 that the guilty plea entered by the victim's mother—which required the mother to testify against defendant—was an *Alford* plea. Such evidence would likely have confused the issues or misled the jury. **State v. Tysinger, 344.**

Witness testimony—cross-examination of defendant's father—relevance—In a prosecution for rape, sexual offenses, and kidnapping involving the assault of a six-year-old victim in a church bathroom, there was no error in the State's cross-examination of defendant's father regarding his supervision of defendant on the day the offenses occurred and whether churchgoers were warned about defendant, where the information elicited was relevant to the charges at issue and well within the scope of the father's testimony on direct examination that defendant needed frequent supervision. **State v. Coffey, 199.**

INDECENT LIBERTIES

Six-year-old victim—touching of chest—sufficiency of evidence—videotaped interview—On one of the charges of taking indecent liberties with a child in a prosecution for rape, sexual offenses, and kidnapping, a video recording of the six-year-old victim's forensic interview constituted sufficient evidence that defendant inappropriately touched the victim's chest after he made her remove her clothes, as detailed in the victim's statement. The interview was properly admitted for substantive purposes since it fell within the medical diagnosis exception to the hearsay rule and was not merely corroborative. **State v. Coffey, 199.**

KIDNAPPING

First-degree—child victim—forcibly removed to church bathroom—sufficiency of evidence—In a prosecution for rape, sexual offenses, and kidnapping, the State presented sufficient evidence on the first-degree kidnapping charge that defendant forcibly removed the six-year-old victim from a hallway in a church to a bathroom, where the victim testified at trial that defendant began his assault on her in the hallway before taking her into the bathroom, a more secluded location, to complete his sexual acts. **State v. Coffey, 199.**

First-degree—jury instructions—variance from indictment—no prejudicial error—In a prosecution for rape, sexual offenses, and kidnapping, the trial court did not plainly err by instructing the jury on a theory of first-degree kidnapping that was not alleged in the indictment. Although the trial court failed to instruct on the element of whether the six-year-old victim had been sexually assaulted, as alleged in the indictment, but included the element that defendant did not release the victim in a safe place, which was not alleged, defendant was not prejudiced where it was unlikely a different result would have been reached since the evidence supported both theories, and it was clear from the record as a whole that the jury found that defendant had sexually assaulted the victim. **State v. Coffey, 199.**

they acted lawfully as "sureties" or "accommodation bondsmen" was meritless. Because N.C.G.S. § 15A-531 defines a "surety" as a professional bondsman who executes a bail bond, defendants could not be sureties on the bonds they paid the professional bondsman (the true surety) to execute. Further, their failure to qualify as "sureties" meant that defendants could not qualify as "accommodation bondsmen" under N.C.G.S. § 58-71-1(1). **State v. Gettleman, 260.**

SCHEDULE FOR HEARING APPEALS DURING 2021

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 11 and 25

February 8 and 22

March 8 and 22

April 12 and 26

May 10 and 24

June 7

August 9 and 23

September 6 and 20

October 4 and 18

November 1, 15, and 29

December 13

Opinions will be filed on the first and third Tuesdays of each month.

STATE v. COFFEY

[275 N.C. App. 199 (2020)]

STATE OF NORTH CAROLINA
v.
WILLIAM BRANDON COFFEY

No. COA19-445

Filed 15 December 2020

1. Indecent Liberties—six-year-old victim—touching of chest—sufficiency of evidence—videotaped interview

On one of the charges of taking indecent liberties with a child in a prosecution for rape, sexual offenses, and kidnapping, a video recording of the six-year-old victim's forensic interview constituted sufficient evidence that defendant inappropriately touched the victim's chest after he made her remove her clothes, as detailed in the victim's statement. The interview was properly admitted for substantive purposes since it fell within the medical diagnosis exception to the hearsay rule and was not merely corroborative.

2. Kidnapping—first-degree—child victim—forcibly removed to church bathroom—sufficiency of evidence

In a prosecution for rape, sexual offenses, and kidnapping, the State presented sufficient evidence on the first-degree kidnapping charge that defendant forcibly removed the six-year-old victim from a hallway in a church to a bathroom, where the victim testified at trial that defendant began his assault on her in the hallway before taking her into the bathroom, a more secluded location, to complete his sexual acts.

3. Kidnapping—first-degree—jury instructions—variance from indictment—no prejudicial error

In a prosecution for rape, sexual offenses, and kidnapping, the trial court did not plainly err by instructing the jury on a theory of first-degree kidnapping that was not alleged in the indictment. Although the trial court failed to instruct on the element of whether the six-year-old victim had been sexually assaulted, as alleged in the indictment, but included the element that defendant did not release the victim in a safe place, which was not alleged, defendant was not prejudiced where it was unlikely a different result would have been reached since the evidence supported both theories, and it was clear from the record as a whole that the jury found that defendant had sexually assaulted the victim.

4. Sexual Offenses—sexual offense with a child by an adult—jury instructions—jury also instructed on first-degree sex offense—conviction vacated

In a prosecution for rape, sexual offenses, and kidnapping, the trial court committed prejudicial error by entering judgment on sexual offense with a child by an adult after instructing the jury on the lesser-included offense of first-degree sex offense, where the jury was not instructed on the only element distinguishing the two offenses—that defendant was at least eighteen years old when he committed the crime. Although there was evidence to show that defendant was thirty-three, and his conviction for rape of a child did include an element that he be at least eighteen, defendant's sentence on the greater offense was improper, and the matter was remanded for resentencing on first-degree sexual offense.

5. Evidence—expert witness testimony—Rule 702—foundation—DNA extraction and analysis

In a prosecution for rape and related charges, the trial court did not plainly err by allowing the admission of expert testimony regarding the DNA profile of a biological sample taken from the six-year-old victim's underwear that matched to defendant, where the expert laid a proper foundation pursuant to Evidence Rule 702(a)(3) regarding the procedures used to extract, analyze, and compare DNA samples.

6. Evidence—prior bad acts—Rule 404(b)—prior victim—similar acts

In a prosecution for rape, sexual offenses, and kidnapping involving the assault of a six-year-old victim in a church bathroom, the trial court did not plainly err by admitting evidence of a prior incident involving defendant and a nine-year-old girl where there were multiple similarities between that incident and the events for which defendant was charged, and where the trial court gave a limiting instruction restricting the jury's use of the prior bad act to prove defendant's identity, plan, or scheme in accordance with Evidence Rule 404(b).

7. Evidence—witness testimony—cross-examination of defendant's father—relevance

In a prosecution for rape, sexual offenses, and kidnapping involving the assault of a six-year-old victim in a church bathroom, there was no error in the State's cross-examination of defendant's father regarding his supervision of defendant on the day the offenses

occurred and whether churchgoers were warned about defendant, where the information elicited was relevant to the charges at issue and well within the scope of the father's testimony on direct examination that defendant needed frequent supervision.

Judge MURPHY concurring in part, concurring in result only in part, and dissenting in part.

Appeal by defendant from judgment entered 17 August 2018 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 3 March 2020.

Attorney General Joshua H. Stein, by Assistant Attorney Kathryn L. Pomeroy-Carter, for the State

Joseph P. Lattimore for defendant-appellant.

BRYANT, Judge.

On 28 September 2015, defendant William Brandon Coffey was indicted on two counts of sexual offense with a child by an adult, rape of a child, first-degree kidnapping, and two counts taking indecent liberties with a child. At the time of the incident, the victim, Maya[1], was six years old, and defendant was thirty-three years old. The matter was tried before the Honorable A. Graham Shirley, Judge presiding.

At trial, the State's evidence tended to show that on 1 September 2015, Maya went with her father to choir practice at their church. Upon arrival, Maya went to the kitchen area to play with the other children. At the same time, the church was also hosting a men's fellowship meeting, which was attended by defendant and his father. The church's video surveillance showed defendant left the men's fellowship meeting two times—the first time for about two minutes, and the next time for about eight minutes. Defendant saw Maya walking to the bathroom and extended his arms to hug and pick her up. Maya thought defendant was a friend of her father's. Another member of the church testified he saw defendant extend his arms toward Maya, pick her up, and hug her. The member testified that he was concerned, stating he "just [] had a feeling something didn't look right." He sought out the assistant pastor to tell him what he saw and asked him if defendant was related to Maya. The

1. Throughout the opinion, a pseudonym "Maya" and the word "child" are used interchangeably to protect the identity of the child-victim and for ease of reading.

assistant pastor didn't know but promised to look into it. Meanwhile, defendant had returned to the meeting but left a second time for much longer.

During that time, defendant saw Maya at the water fountain and told her to take her pants down. After "kissing [her] butt," defendant took Maya into the men's bathroom and told her to take off her pants, underwear, and shirt. Maya testified that defendant "used the part he pees with to [penetrate] the part [she] pee[s] with" and then defendant told her to roll over on her stomach and defendant "put the part that [he] pees with on [Maya's] butt." Maya said she felt poop coming out, and she also peed on the floor. Maya tried to yell for help, but defendant covered her mouth and nose and told her to "hold on just a little bit longer." Afterwards, defendant "wiped the part he pees with" and left the bathroom. Maya told her father that she had peed on herself. After leaving the church, Maya told her father that defendant had taken her to the bathroom and tried to explain what defendant had done to her. Maya's father immediately returned to the church and talked to the pastor about what had happened. The pastor then called the police.

Maya was taken to the hospital, where a standard rape examination was conducted. A nurse collected vaginal, rectal, and oral smears as well as Maya's clothes and underwear. Maya was also taken to SafeChild, a specialized child advocacy center for abused children. While there, she had a forensic interview, which was videotaped and later introduced into evidence at trial without objection. The church member, who had seen defendant pick up and hug Maya, was asked to identify the man he saw in a photo lineup. The church member identified defendant with 100 percent certainty. Defendant was then arrested and advised of his rights. A search warrant was served to obtain a buccal swab of the inside of defendant's mouth. The swab was sent to the North Carolina State Crime Laboratory and tested, using YSTR DNA ("DNA"), against a semen sample found on Maya's underwear.[2] The DNA profile from the semen on Maya's underwear matched the DNA profile from defendant's buccal swab. At the close of the State's case, the only evidence presented by defendant was the testimony of his father.

A jury convicted defendant on all counts. Defendant was sentenced as follows: 300 to 420 months imprisonment for each count of first-degree sex offense with a child; 300 to 420 months imprisonment for rape of a child; 83 to 112 months imprisonment for first-degree kidnapping; and 19 to 32 months imprisonment for each count of indecent liberties with

2. YSTR DNA testing is a type of autosomal testing for male DNA (Y chromosome).

a child. The sentences were ordered to run consecutive to each other. The trial court ordered defendant to register as a sex offender and that a satellite-based monitoring hearing be conducted upon defendant's release from prison. Defendant entered timely notice of appeal.

On appeal, defendant argues the trial court erred by I) denying his motion to dismiss a charge of taking indecent liberties with a child and kidnapping, II) entering judgment on two counts of sexual offense with a child by an adult after instructing the jury on the lesser charge of first-degree sex offense, and instructing the jury on first-degree kidnapping, III) admitting expert witness testimony about DNA profiles and allowing 404(b) evidence of defendant's prior misconduct with another child, and IV) allowing improper cross-examination of defendant's father.

I

Defendant first argues the trial court erred by denying his motion to dismiss for indecent liberties with a child and first-degree kidnapping. We disagree.

We review a "trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). In deciding whether to grant a defendant's motion to dismiss, the trial court must consider "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation and quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980) (citations omitted).

Indecent Liberties with a Child

[1] Defendant does not challenge the evidence that resulted in a verdict of taking indecent liberties based on kissing the child. As to the other charge of taking indecent liberties with a child, defendant argues the State did not provide sufficient evidence that defendant acted inappropriately by touching Maya's chest. Specifically, defendant argues that the evidence of defendant placing his hand on Maya's chest was offered for corroborative purposes only. We disagree.

Under N.C. Gen. Stat. § 14-202.1, a defendant can be convicted of taking indecent liberties with a child if: 1) the defendant is at least

sixteen years old, 2) the child-victim is under the age of sixteen, and 3) the defendant is at least five years older than the child in question. Additionally, a defendant is guilty of taking indecent liberties with a child under subsection (a)(1) if he "[w]illfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire[.]" N.C. Gen. Stat. § 14-202.1(a)(1) (2019).

In the instant case, Maya testified that defendant removed her clothes and got on top of her in the men's bathroom. She stated defendant touched her and kissed her. The forensic interviewer from SafeChild testified about Maya's videotaped interview at SafeChild. The videotaped interview was introduced into evidence and played for the jury without objection from defendant. During the interview, Maya specifically stated that defendant touched her chest during the assault.

Nevertheless, defendant contends the evidence from Maya's videotaped interview was offered for corroborative purposes only because Maya's testimony at trial never specifically stated that defendant touched her on the chest. As such, according to defendant, the trial court erred by instructing the jury as to indecent liberties based on the videotaped interview. We disagree.

This Court has previously held that statements made by a victim during an interview with a licensed clinical social worker can be used as substantive evidence at trial when the statements were made with the understanding that they would lead to medical diagnosis or treatment and that the statements were reasonably pertinent to diagnosis or treatment. *State v. Thornton*, 158 N.C. App. 645, 649–51, 582 S.E.2d 308, 310–11 (2003) (holding that the videotaped interview of a child-victim's statements to a social worker was properly admitted for substantive purposes under the medical diagnosis or treatment exception to the hearsay rule).

"Rule 803(4) [Statements for Medical Diagnosis or Treatment] requires a two-part inquiry: (1) whether the declarant's statements were made for purposes of medical diagnosis or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment." *Id.* at 649–50, 582 S.E.2d at 311 (citing *State v. Hinnant*, 351 N.C. 277, 284, 523 S.E.2d 663, 667 (2000)).

Here, the videotaped interview was conducted at SafeChild following Maya's sexual assault. The forensic interviewer testified about the standard procedure at SafeChild, which includes conducting a forensic interview and a medical exam for a child-victim's diagnosis. The

interviewer testified that prior to an interview with a child-victim, the child-victim is given a tour, so the child knows "[it] is really important for their health, that we are going to talk about today, we need to kind of know what happened, make sure we are telling the truth, and you are going to see the doctor today for anything that you are worried about with your body." The interviewer further testified that Maya was given a medical exam and was interviewed. During the interview, she specifically described the acts done to her by defendant, including defendant touching her on the chest. According to the witness, "[Maya] offered a number of those kinds of details, where, you know, it just was remarkable."

Given the evidence presented, Maya's videotaped interview was properly admitted under Rule 803(4) as her statements were made for the purposes of medical diagnosis or treatment, and the statements were reasonably pertinent to diagnosis or treatment. Further, while not distinguishing specific videos, the trial court instructed the jury without objection that the videos, including the forensic video at issue here, could be considered as substantive evidence. The evidence was sufficient to support denial of the motion to dismiss the challenged charge of taking indecent liberties with a child. Defendant's argument is overruled.

First-degree Kidnapping

[2] As to the first-degree kidnapping charge, defendant contends there was insufficient evidence to support that defendant forcibly removed Maya to the bathroom. We disagree.

Under N.C. Gen. Stat. § 14-39, any person who unlawfully confines, restrains, retains or removes a person under the age of sixteen from one place to another without the consent of a parent or legal guardian, will be guilty of kidnapping if the confinement, restraint or removal is "for the purpose of . . . [f]acilitating the commission of any felony" or "[d]oing serious bodily harm to or terrorizing the person so confined, restrained or removed[.]" Further, "[i]f the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first[-] degree[.]" N.C. Gen. Stat. § 14-39(b) (2019).

"Kidnapping can be accomplished either by actual force or by fraud or trickery which induce[s] the victim to be removed to a place other than where the victim intended to be." *State v. Williams*, 201 N.C. App. 161, 171–72, 689 S.E.2d 412, 419 (2009) (alterations in original) (citation and quotation marks omitted)). "Asportation of a rape victim is

sufficient to support a charge of kidnapping if the defendant could have perpetrated the offense when he first threatened the victim, and instead, took the victim to a more secluded area to prevent others from witnessing or hindering the rape." *State v. Walker*, 84 N.C. App. 540, 543, 353 S.E.2d 245, 247 (1987) (citations omitted).

In the instant case, Maya testified that when she left the kitchen area to get some water, she saw defendant standing near the water fountain. At the water foundation, Maya testified that defendant asked her to take her pants down and kissed her bottom. Defendant then "took [her] to the men's bathroom," where he completed the sexual assault previously described. Thus, defendant's contention, that the evidence neither shows that he used actual force nor fraud or trickery to remove Maya, is without merit. Prior to the sexual assault, Maya had interacted with defendant, whom she thought was a friend of her father when he hugged her. Defendant began his sexual assault of Maya at the water fountain, where he had her pull down her pants and kissed her butt, and where he could have continued his assault, but instead *took* her to a secluded place, the men's bathroom, to further enable his ability to complete his sexual acts out of the presence of potential witnesses. The asportation of Maya from the water fountain to the men's bathroom in order to further sexually assault her was sufficient to support that element of the kidnapping charge. *See id.*

II

Defendant also raises arguments regarding his convictions of first-degree kidnapping and sexual offense with a child, arguing that the trial court erred by instructing on first-degree kidnapping and by failing to instruct on sexual offense with a child by an adult. Having not objected at trial to the issues raised on appeal regarding the jury instructions, we review each of defendant's arguments for plain error only.

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (citation and quotation marks omitted).

First-Degree Kidnapping Jury Instructions

[3] Defendant argues the trial court committed plain error by instructing the jury on first-degree kidnapping. After careful consideration, we find no prejudicial error.

The first-degree kidnapping indictment returned against defendant by the Wake County grand jury charged as follows:

> [That] defendant named above unlawfully, willfully, and feloniously did confine, restrain or remove from one place to another [Maya], a child under the age of 16, without consent of a parent or legal custodian. The kidnapping was done in furtherance of a felony or for the purpose of committing a sexual assault. [] *[D]efendant also sexually assaulted [Maya]* []. This act was done in violation of NCGS § 14-39.

(emphasis added). The evidence at trial was consistent with the allegations in the indictment. The evidence showed that the act elevating the offense to first-degree kidnapping was that Maya was sexually assaulted. However, the trial court instructed the jury in pertinent part as follows:

> [T]he defendant has been charged with first[-]degree kidnapping. For you to find the defendant guilty of this offense, the state must prove five things beyond a reasonable doubt.
>
> First, that the defendant unlawfully removed a person from one place to another;
>
> Second, that the person had not reached her 16th birthday and her parent did not consent to this removal;
>
> Third, that the defendant removed that person for the purpose of facilitating the defendant's commission of rape or a sex offense. . . .
>
> Fourth, that this removal was a separate and complete act, independent and apart from the rape or sex offense;
>
> *And fifth, that the person was not released by the defendant in a safe place.*

(emphasis added).

By instructing the jury (as to the fifth element) that Maya was not released in a safe place and failing to instruct the jury on the element of whether Maya had been sexually assaulted, there was a variance between the language in the indictment and the language in the jury instruction. Such a variance is usually considered prejudicial error. However, upon plain error review of the entire case, it is not probable that the jury would have reached a different result if given the correct

instruction. *See id.* ("[A] defendant *must* establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." (emphasis added)).

Defendant argues that *State v. Brown*, 312 N.C. 237, 321 S.E.2d 856 (1984), is factually indistinguishable, and thus, defendant is entitled to a new trial on the kidnapping charge. However, to the contrary, *Brown* is distinguishable. In *Brown*, our Supreme Court found there was a variance between the first-degree kidnapping indictment and the jury instructions. The indictment alleged that the victim was restrained for the purpose of facilitating "attempted rape" and that defendant did not release the victim in a safe place. *Id.* at 247, 321 S.E.2d at 862. The jury instructions stated that the victim was restrained for the purpose of "terrorizing her" and "was sexually assaulted." *Id.* In addition to the trial judge erroneously "instruct[ing] on different theories for both the crime of kidnapping and the basis for first[-]degree kidnapping than were alleged in the indictment[,]" the erroneous instruction was repeated more than once. *Id.* Further, the evidence at trial did not support the trial court's instructions. *Id.* at 248, 321 S.E.2d at 862–63.

Notwithstanding the holding in *Brown*, the instant case is more analogous to *State v. Tirado*, 358 N.C. 551, 599 S.E.2d 515 (2004), where our Supreme Court held the jury instructions setting out a theory of a kidnapping charge not included in the indictment was erroneous. In *Tirado*, the evidence supported both the theory set out in the indictment and the additional theory set out in the trial court's instructions. *Id.* at 574–76, 599 S.E.2d at 532–33. Accordingly, the Supreme Court concluded that "a different result would not have been reached had the trial court instructed only on the purpose charged in the indictment, and that the error in the instructions was not prejudicial." *Id.* at 576, 599 S.E.2d at 533.

Here, as in *Tirado*, the evidence at trial supported both the theory in the indictment and the additional theory set out in the trial court's instructions. While it was error for the trial court to instruct on the fifth element—that the victim was not released in a safe place—as opposed to the language of the indictment—that the victim was also sexually assaulted—the record, as a whole, makes it clear the jury found that defendant had sexually assaulted Maya. The evidence also supported that Maya was not left in a safe place—specifically, she was left by defendant on the floor of the men's bathroom having urinated and defecated on herself following the sexual assault by defendant. It is unlikely a different result would have been reached had the trial court properly instructed the jury on the charged theory in the indictment. Thus, no prejudicial error existed in the jury instructions.

Sexual Offense Jury Instructions

[4] Defendant argues the trial court erred by entering judgment on sexual offense with a child by an adult after instructing the jury on first-degree sex offense, a lesser offense. We agree and find this to be prejudicial error.

To convict for sexual offense with a child in violation of N.C. Gen. Stat. § 14-27.28, formerly codified under N.C. Gen. Stat. § 14-27.4A, "[a] person is guilty . . . if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years." In contrast, a conviction for first-degree sexual offense under N.C. Gen. Stat. § 14-27.29, formerly codified as N.C. Gen. Stat. § 14-27.4(a)(1), can be obtained "if the person engages in a sexual act with a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim."

> While both offenses require the State to prove that the defendant engaged in a sexual act with a victim who was a child under the age of 13 years, sexual offense with a child . . . has a greater requirement with respect to the age of a defendant at the time of the act. For first[-]degree sexual offense, . . . the State must prove only that the defendant was at least 12 years old and at least four years older than the victim, whereas for [sexual offense with a child], the State must prove that the defendant was at least 18 years old.

State v. Hicks, 239 N.C. App. 396, 406–07, 768 S.E.2d 373, 379 (2015). "It is well settled in North Carolina that when a defendant is indicted for a criminal offense[,] he may be convicted of the offense charged or of a lesser included offense when the greater offense in the bill includes all the essential elements of the lesser offense." *State v. Snead*, 295 N.C. 615, 622, 247 S.E.2d 893, 897 (1978).

Here, defendant was indicted for sexual offense with a child. However, rather than instruct the jury on the indicted offense—sexual offense with a child by an adult—the trial court instructed the jury on the lesser offense—first-degree sexual offense. The trial court failed to submit to the jury the additional element necessary for sexual offense with a child by an adult: that defendant was at least eighteen years old, at the time he committed the offense.

We note the only distinction between sexual offense with a child and first-degree sexual offense is the element of establishing defendant's

age. There was evidence in the record to show that defendant was thirty-three years old when he committed a sexual act on six-year-old Maya. Additionally, defendant's conviction of rape of a child (requiring that the defendant be at least 18 years of age) following the same trial session presumably suggest that the jury found the State's evidence sufficient to prove he was at least eighteen years of age.

Nevertheless, in other circumstances, the failure to instruct on the additional element, standing alone, would not have a prejudicial impact on a defendant's verdict had that defendant been sentenced to first-degree sexual offense and the evidence was sufficient to support a conviction for this lesser offense. Defendant was sentenced as a Level II offender for sexual offense with a child by an adult, a Class B1 felony, punishable by an active sentence no less than 300 months. *See* N.C.G.S. § 14-27.28(b). The lesser included offense of first-degree sexual offense, also a Class B1 felony, is punishable by 221 to 276 months in the presumptive range.[3]

Here, as with the kidnapping instructions, we consider the entire record and find that defendant has demonstrated prejudicial error. The judgment in defendant's case, although consistent with the verdict, impermissibly sentenced defendant to a greater offense than set forth in the instructions. The jury instruction clearly outlined the lesser included offense of first-degree sexual offense, and thus, it was improper for the trial court to enter judgment for two counts of sexual offense with a child. Accordingly, on this record, we must vacate defendant's conviction for sexual offense with a child by an adult and remand for resentencing on the first-degree sexual offense.

III

Defendant raises issues on appeal involving the admission of evidence—particularly contesting the expert witness testimony regarding DNA testing on Maya's underwear and evidence of defendant's prior bad acts. Because defendant did not properly preserve his challenges to the admission of this evidence, we review for plain error only. N.C.R. App. P. 10(a)(4); *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

Admission of expert witness testimony

[5] Defendant argues the trial court committed plain error by admitting expert witness testimony regarding the DNA profile from Maya's

3. For sentencing purposes, the length of the sentence in North Carolina is based on a defendant's prior criminal history. Defendant was Level II prior record level offender with 4 prior record points. *See* N.C.G.S. § 15A-1340.17(c) (2019).

underwear, which matched defendant, contending the trial court lacked a sufficient foundation to satisfy the requirements of Rule 702(a)(3). We disagree.

Under the North Carolina Rules of Evidence, an expert witness may testify in the form of an opinion if: (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. N.C. Gen. Stat. § 8C-1, Rule 702. The expert must "[have] knowledge of facts which would be helpful to a jury in reaching a decision[.]" *State v. Fletcher*, 322 N.C. 415, 422, 368 S.E.2d 633, 637 (1988).

> Subsections (1)-(3) [of Rule 702] compose the three-pronged reliability test[.] The precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony[.] [While] the trial court has discretion in determining how to address the three prongs . . . [,] [t]he primary focus should be the reliability of the witness's principles and methodology, not . . . the conclusions that they generate[.]

State v. McPhaul, 256 N.C. App. 303, 313, 808 S.E.2d 294, 303 (2017) (alterations in original) (citations omitted and quotation marks omitted).

"[A]n expert witness must be able to explain not only the abstract methodology underlying the witness's opinion, but also that the witness reliably applied that methodology to the facts of the case." *Id.* at 316, 808 S.E.2d at 305; *see also State v. Gray*, 259 N.C. App. 351, 356–57, 815 S.E.2d 736, 740–41 (2018) (holding that a proper foundation was established at the time the challenged expert provided her opinion because her testimony demonstrated that she was a qualified expert, with over 20 years of experience in the field, and that her opinion was the product of reliable principles and methods which she reliably applied to the facts of the case).

In the instant case, Agent Meyer, a qualified expert in the field of forensics and an employee at the North Carolina State Crime Lab, testified to her qualifications in the area of DNA analysis as well as her training and experience in gathering evidence for DNA profiles. In particular, Agent Meyer testified to the process of extracting DNA from defendant's buccal swab by performing autosomal testing, which is a form of testing "exclusively for male DNA." Agent Meyer then described the four-step process to extract DNA from defendant:

[MEYER]: YSTRs are sort of another class of the autosomal testing[.]. . . YSTRs are typically used in cases of alleged sexual assault since they don't amplify the female DNA component on items such as body swabs, vaginal, rectal or oral swab and the female component will usually be an overwhelming abundance compared to the male component. And YSTRs can kind of – they will ignore the female component and just focus strictly on the male aspects of what may be present in that sample. And that is primarily what YSTR is used for, is to screen out the female portion of the sample.

. . . .

So compared to regular autosomal DNA, the first couple of steps where you extract DNA from an item where we use a series of chemicals to remove the DNA from the item you are testing, the quantitation step which is where you get an estimate of how much DNA you are able to obtain, those two steps are exactly the same no matter which type of testing is being performed. The difference comes in the third step which is what we refer to as amplification, and that is where we make millions of copies of specific areas on the DNA that we want to look at because those areas will differ from person to person. Therefore, they are the most informative.

. . . .

So after those areas have been amplified, we move them on to an instrument where it can separate out the different areas that we test and it produces a graph that we can look at and make visual comparisons between the patterns observed on the evidence and those that are observed from the standards.

. . . .

[THE STATE]: These procedures that you are talking about for YSTR, have they been widely accepted as valid in the scientific community?

[MEYER]: Yes.

[THE STATE]: Did you use those widely accepted procedures in analyzing the evidence from this case?

> [MEYER]: Yes.
>
> [THE STATE]: Were you qualified to do YSTR testing?
>
> [MEYER]: Yes. I was proficiency tested, and in addition to that, I performed the in-house validation for the system that we are currently using for YSTR.
>
> . . . .
>
> [THE STATE]: Did you receive evidence in the case involving [ ] defendant . . . and the victim, [Maya]?
>
> [MEYER]: Yes.
>
> . . . .
>
> [MEYER]: I performed YSTR analysis on both the buccal sample from [defendant] as well as the extract that [was] generated from [Maya's] underwear previously.
>
> . . . .
>
> [THE STATE]: Agent Meyer, when you did these procedures for this case, what were your results?
>
> . . . .
>
> [MEYERS]: The YSTR DNA profile obtained from the cutting from the underpants matche[d] the YSTR DNA profile obtained from [defendant].

Based on the testimony above, a proper foundation was laid to admit Agent Meyer's expert testimony regarding the DNA testing of Maya's underwear. Agent Meyer thoroughly explained the methods and procedures of performing autosomal testing and analyzed defendant's DNA sample following those procedures. That particular method of testing has been accepted as valid within the scientific community and is a standard practice within the state crime lab. Thus, her testimony was sufficient to satisfy Rule 702(a)(3). Defendant's argument is overruled.

Admission of Defendant's Prior Bad Acts

[6] Defendant next argues it was error to allow 404(b) evidence that defendant engaged in misconduct with a prior victim, Dana.[4] Specifically, defendant argues that because the incident with Dana was unrelated to the incident with Maya, the trial court should not have allowed the

4. A pseudonym is used to protect the identity of the victim witness.

prior bad acts evidence. Although defendant filed a motion in limine to exclude the 404(b) evidence, which motion was denied, he did not renew his objection to the admission of evidence, and now asks that we review this argument for plain error. N.C.R. App. P. 10(a)(4); *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

Under N.C. Gen. Stat. § 8C-1, Rule 404, evidence of other crimes may be admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." This rule is "guided by two constraints: similarity and temporal proximity." *State v. Johnson*, 145 N.C. App. 51, 58, 549 S.E.2d 574, 579 (2001) (citation and quotation marks omitted).

> [F]or evidence of defendant's prior crimes or bad acts to be admissible to show the identity of the defendant as the perpetrator of the crime for which he is being tried, there must be some . . . particularly similar acts that would indicate that the same person committed both crimes, . . . [and while t]he similarities need not be unique and bizarre, they must tend to support a reasonable inference that the same person committed both the earlier and later acts.

State v. Gary, 348 N.C. 510, 521, 501 S.E.2d 57, 65 (1998) (internal citation and quotation marks omitted); *see also State v. Bagley*, 321 N.C. 201, 207–08, 362 S.E.2d 244, 248 (1987) (holding that in a first-degree sexual offense case, evidence that defendant attempted a remarkably, odd and strikingly similar *modus operandi* some ten weeks after his attack on victim was relevant and admissible as tending to prove defendant's modus operandi, motive, intent, preparation, and plan).

In the instant case, the trial court conducted a *voir dire* hearing on defendant's 404(b) motion in limine. Dana testified at the hearing that on 30 May 2019, after leaving a pool at her apartment complex, defendant approached her. Dana was *nine years old* at that time. Defendant pulled down Dana's pants and touched her bottom. Defendant then grabbed Dana's wrist and started pulling her. Defendant pulled Dana to the other side of her building and put her on the stairs. Defendant took off her shoe and kissed her foot. As Dana began to scream, defendant slapped her and told her to be quiet. At the hearing, Dana identified defendant as her assailant.

The trial court's findings at the *voir dire* hearing reflect that Maya and Dana were young females, similar in age. The findings also established the following: both females were strangers to defendant; they were separated from a group and taken to a more secluded location;

they were touched improperly beginning with the buttocks; and they were told to be quiet during the assault. The trial court found the facts similar enough in both cases to be admissible under Rule 404(b), and Dana was allowed to testify before the jury. Dana's testimony before the jury was substantially the same as at the hearing on the motion to suppress.

We note the trial court gave a limiting instruction to the jury that Dana's testimony was received "solely for the purpose of showing the identity of who committed the crime . . . or that there existed in the mind of [ ] defendant a plan, scheme, system or design and involving the crime charged in this case."

Defendant argues there were significant differences between the two incidents such that Dana's testimony should have been excluded. We disagree. In the instant case, Maya, a six-year-old child, was approached by defendant at the water fountain after leaving the kitchen where she was playing with other children. Similarly, Dana, a nine-year-old child, was approached by defendant after she separated from her group of friends at a pool. In both cases, defendant first pulled down the victims' pants and touched their bottoms. Defendant also moved both victims to secluded locations in an attempt to continue his sexual assault. Further, defendant's use of force was similar in both incidents: in one instance, he used his hand to slap the victim's face, and in the other, he put his hand over the victim's mouth to quiet her.

In sum, defendant's actions toward these young children were similar enough that the trial court did not err in admitting evidence of prior bad acts under Rule 404(b). Defendant's argument is overruled.

IV

[7] Defendant argues the trial court erred by allowing the cross-examination of defendant's father. Specifically, defendant contends the State improperly elicited testimony from defendant's father that was not relevant to defendant's trial. We disagree.

"The admissibility of evidence is governed by a threshold inquiry into its relevance. In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated." *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (2000) (internal citation and quotation marks omitted). "Whether [the] evidence is relevant is a question of law, thus we review the trial court's admission of the evidence *de novo*. Defendant bears the burden of showing that the evidence was erroneously admitted and that he was

prejudiced by the error." *State v. Kirby*, 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010) (internal citation omitted).

Under N.C. Gen. Stat. § 8C-1, Rule 611, "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." However, "[t]he scope of cross-examination is limited to those matters that are relevant issues before the jury." *State v. Hosey*, 79 N.C. App. 196, 202, 339 S.E.2d 414, 417 (1986). Evidence that is not relevant is inadmissible. N.C. Gen. Stat. § 8C-1, Rule 402.

Here, on direct examination, defendant's father generally testified regarding his relationship with defendant, defendant's mental capacity, and defendant's current living arrangement. He testified about how defendant needed help with day-to-day activities because "he was lacking" the ability to do things for himself without specific instructions. Defendant's father stated that he was "like a chaperone" to the extent that defendant needed to be watched, so "nobody [took] advantage of him."

Thereafter, on cross-examination, the State asked defendant's father questions about his supervision of defendant at the church on the day that the events took place. The following exchange occurred:

> Q. You said that you kind of have to watch him, is that right?
>
> A. Yes.
>
> . . . .
>
> Q. Were you not told by the church that you were supposed to be watching him and not let him alone near children?
>
> A. I know we had an agreement that we had to take to saying that he could come to that church.
>
> . . . .
>
> A. *We had to get a permission slip signed and take to . . . the parole officer in Raleigh[,] saying that he could go to that church unless someone had a problem with it, and then we would be asked to leave, not continue to come to that church. As long as it was all right with the church, he could go to church.*
>
> Q. Did you notify all these parents who were bringing their children into this church?
>
> A. No. Only I had the secretary . . . . I think she set it up. She was the go between. We had to get permission slip

from the pastor or from the board to take back to the parole officer to make sure we had permission to go to the church. And out of the hundreds of -- a couple hundred people that go to that church, we didn't go around to each and every last one saying, Watch my son around your kid, watch my son around your kid.

Q. Did you watch your son walk out of the room?

A. Yes.

Q. You knew he was out of the room by himself?

A. Yes.

Q. You knew that there were children in the kitchen?

A. I didn't pay any attention to that.

. . . .

Q. You didn't hear the children running up and down the hallway?

A. Yes, running up and down the hallway making a ruckus, yes, but in the kitchen, I don't know.

Q. So you knew your son had walked out of the room by himself and that there were children in there and you didn't do anything?

A. We have been going to that church. There are children in the service. We had been going to that church to the fellowship meetings. Okay. There are, I guess, children that come with their parents. We have been to functions at the Dream Center where there have been parents and children. I can't go up to every last one and say, Watch out for my son. And you better watch him. He is dangerous. Which I don't think he is dangerous, but is that what you want me to do? I don't know. You know. It's unreasonable.

(emphasis added). Defendant argues that whether or not defendant's father warned the children at the church about defendant had no bearing on whether defendant committed the offenses defendant was charged with. However, the questions on cross-examination elicited relevant testimony and were well within the scope of defendant's father's direct testimony that defendant needed frequent supervision for basic activities. Clearly, defendant was on parole for some type of concerning

misconduct, which required permission for defendant to attend the church. Because the cross-examination was relevant and related to the issues at trial, defendant was not prejudiced by the admission of his father's testimony.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judge STROUD concurs.

Judge MURPHY concurs in part, concurs in result only in part, and dissents in part with separate opinion.

MURPHY, Judge, concurring in part, concurring in result only in part, and dissenting in part.

While I concur in parts of the Majority, I respectfully disagree with some of the results reached by the Majority and portions of its analysis as more thoroughly discussed, below.

A. Indecent Liberties with a Child[1]

Defendant argues there was insufficient evidence to support his conviction for indecent liberties with a child since the video evidence provided by the State on this issue was admitted for corroborative purposes only. The Majority disagrees and concludes video evidence of Maya's out-of-court statements to a forensic examiner was submitted as substantive evidence and supported Defendant's conviction for indecent liberties with a child. I concur in result, but write separately to fully evaluate Defendant's argument as clarified in his reply brief.

Defendant argues the trial court provided a more specific jury instruction regarding prior statements, and as a result the video evidence of Maya's out-of-court statements were admitted solely for corroborative purposes. We have previously observed, "[o]ur system of justice is based upon the assumption that trial jurors are women and men of character and of sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so." *State v. Hauser*, 844 S.E.2d 319, 322 (N.C. Ct. App. 2020) (quoting *State v. Hines*, 131 N.C. App. 457, 462, 508 S.E.2d 310, 314 (1998)). When jurors are instructed on the general purpose of evidence which is followed by

1. This section corresponds with the Majority Part I: Indecent Liberties with a Child. *Supra* at 203-5.

more specific instructions, they are presumed to understand and apply the more specific instructions provided by the trial court.

While Defendant's argument is generally correct, it does not apply to this case. Here, the trial court provided the following jury instructions in part:

> Videos were introduced as evidence in this case. These videos may be considered by you as evidence of facts they illustrate or show.
>
> . . .
>
> Evidence has been received tending to show that at an earlier time a witness made a statement which may conflict or be consistent with the testimony of the witness at this trial. You must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial.

In addition to Maya's forensic interview, there were two other instances where prior statements were introduced into evidence. After these other prior statements were introduced, the trial court gave limiting instructions that substantially tracked the North Carolina pattern jury instruction, which reads:

> Evidence has been received tending to show that at an earlier time a witness made a statement which may conflict or be consistent with the testimony of the witness at this trial. You must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe the earlier statement was made, and that it conflicts or is consistent with the testimony of the witness at this trial, you may consider this, and all other facts and circumstances bearing upon the witness's truthfulness, in deciding whether you will believe or disbelieve the witness's testimony.

N.C.P.I.—CRIM. 105.20. Conversely, there was no limiting instruction requested or provided by the trial court regarding the introduction of Maya's forensic interview.

Given these other instances of prior statements and the limiting instructions which followed them, it is clear the trial court was referring to these other prior statements in its jury instruction on corroborative

evidence. Moreover, in addition to the jury instruction regarding the substantive use of video evidence, the absence of a limiting instruction regarding the forensic interview shows the trial court did not limit its substantive use. While Defendant's argument has merit, the specifics of this case do not entitle him to the outcome for which he advocates.

B. Sexual Offense Jury Instructions[2]

The Majority properly finds the trial court erred by entering judgment on sexual offense with a child by an adult after instructing the jury on first-degree sex offense, a lesser offense. However, the Majority concludes this instructional error amounts to plain error. I disagree with this conclusion.

"[P]lain error is to be applied cautiously and only in the exceptional case, [and] the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]" *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citation, alteration, and quotation marks omitted). Under the plain error standard of review, Defendant must first "demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, [Defendant] must establish prejudice—that, after examination of the *entire record*, the error had a probable impact on the jury's finding that [Defendant] was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (internal citation and quotation marks omitted) (emphasis added). Following *Lawrence*, plain error review requires us to look at the entire record on appeal.

As observed by the Majority, a person can be convicted of sexual offense with a child in violation of N.C.G.S. § 14-27.28[3] "if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years." *Supra* at 209. Looking at the entire Record, Defendant's conviction of rape of a child required the jury to find beyond a reasonable doubt "that at the time of the acts alleged, [D]efendant was at least 18 years of age." The rape of a child element satisfies our inquiry on plain error review and we must conclude the instructional error did not have any impact on the verdict much less a "probable impact."

I agree the trial court erred in instructing the jury, however, since the jury found beyond a reasonable doubt Defendant was at least 18

2. This section corresponds with the Majority Part II: Sexual Offense Jury Instructions. *Supra* at 209-10.

3. Formerly codified under N.C.G.S. § 14-27.4A.

years old in another portion of its verdict and all the charges against Defendant occurred on the same date, there was no plain error.

C. First-Degree Kidnapping Jury Instructions[4]

The Majority finds the trial court did not commit plain error when it instructed the jury on a theory not alleged in the indictment because the evidence at trial supported both the theory in the indictment and the additional theory set out in the trial court's instructions. While I agree with the Majority that Defendant did not suffer plain error, I dissent from the Majority's analysis of this issue. Further, I dissent from the Majority's outcome of this issue as we must remand for the trial court to arrest judgment on first-degree kidnapping and enter a sentence on second-degree kidnapping.

1. Erroneous Instruction

In finding the variance did not amount to plain error, the Majority distinguishes the current case from *State v. Brown*, 312 N.C. 237, 321 S.E.2d 856 (1984) and relies on *State v. Tirado*, 358 N.C. 551, 599 S.E.2d 515 (2004). I find the Majority's reliance on *Tirado* is misplaced.

Tirado involved the kidnapping of three victims, Tracy Lambert, Susan Moore, and Debra Cheeseborough by two defendants. *Tirado*, 358 N.C. at 559, 599 S.E.2d at 523. The first indictment alleged the defendants "confined, restrained, and removed [Lambert and Moore] for the purpose of 'facilitating the commission of a felony.'" *Id.* at 575, 599 S.E.2d at 532. The trial court instructed the jury it could find the defendants guilty if it found each defendant "'removed' Lambert or Moore for the purpose of 'facilitating the defendant's or another person's commission of robbery with a firearm or doing serious bodily injury to the person so removed.'" *Id.* The second indictment alleged "each defendant confined, restrained, and removed [Cheeseborough] for the 'purpose of doing serious bodily injury to her.'" *Id.* The trial court instructed the jury that it could find the defendants guilty if it found each defendant "removed the victim for the purpose of 'facilitating . . . commission of robbery with a firearm or for the purpose of doing serious bodily injury.'" *Id.*

The kidnapping instruction regarding Lambert and Moore was more specific than the indictment language, and the kidnapping instruction regarding Cheeseborough included an additional purpose to the one alleged in the indictment. Both jury instructions involved *additional*

4. This section corresponds with the Majority Part II: First-Degree Kidnapping Jury Instructions. *Supra* at 206-08.

language beyond the indictment. The issue in *Tirado* was one of mere surplusage and it is not applicable to the facts of this case.

Our kidnapping statute provides:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . .
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; []
>
> . . .
>
> (b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

N.C.G.S. § 14-39 (2019). The first-degree kidnapping indictment here charged the following:

> [D]efendant named above unlawfully, willfully, and feloniously did confine, restrain or remove from one place to another [Maya], a child under the age of 16, without the consent of a parent or legal custodian. The kidnapping was done in furtherance of a felony or for the purpose of committing a sexual assault. [] *[D]efendant also sexually assaulted [Maya]* []. This act was done in violation of [N.C.G.S.] § 14-39.

(Emphasis added). However, the jury was instructed:

> [D]efendant has been charged with first degree kidnapping. For you to find the [D]efendant guilty of this offense,

> the state most prove five things beyond a reasonable doubt. First, that the [D]efendant unlawfully removed a person from one place to another; Second, that the person had not reached her 16th birthday and her parent did not consent to this removal; Third, that the [D]efendant removed that person for the purpose of facilitating the [D]efendant's commission of rape or a sex offense. A sex offense includes anal intercourse, which I have previously defined for you, and anilingus, which is the touching by the lips or tongue of one person and the anus of another; Fourth, that this removal was a separate and complete act, independent and apart from the rape or sex offense; And fifth, *that the person was not released by the [D]efendant in a safe place.*

(Emphasis added). Here, the first-degree kidnapping indictment alleged "Defendant also sexually assaulted [Maya] []." This language was not included in the jury instruction, and the jury was charged with finding Defendant's guilt on a completely separate element not alleged by the Grand Jury in its indictment, "that the person was not released by the [D]efendant in a safe place." Unlike *Tirado*, where there was an instruction on the indicted charge plus surplusage, the trial court here gave an instruction only on a theory not alleged in the indictment. I find *Brown* more analogous to these facts.

Rather than a surplusage issue, *Brown* involved instructions on completely distinct theories from those alleged in the indictment. *Brown*, 312 N.C. at 247, 321 S.E.2d at 862. In *Brown*, the indictment provided the theory of kidnapping was "unlawfully removing [the victim] from one place to another and confining and restraining [the victim] for the purpose of facilitating the commission of . . . attempted rape[,]" and the "defendant did not release the victim in a safe place." *Id.* However, the trial court instructed the jury it could find the defendant guilty of first-degree kidnapping if he "removed, restrained and confined the victim for the purpose of terrorizing her" and if he sexually assaulted the victim. *Id.* (internal quotation marks omitted). In finding plain error, our Supreme Court noted it "has consistently held that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon a theory not supported by the bill of indictment." *Id.* at 248, 321 S.E.2d at 863 (citing *State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980); *State v. Dammons*, 293 N.C. 263, 272, 237 S.E.2d 834, 840-41 (1977)).

Here, the trial court permitted the jury to convict Defendant upon a theory not alleged in the indictment. Under *Brown*, the variance here constitutes error by the trial court.

2. Plain Error

The Majority concludes this erroneous instruction does not amount to plain error because the evidence at trial supported both the theory in the indictment and the theory instructed to the jury. I agree with its conclusion of no plain error, but dissent from the Majority's reasoning and the eventual result as discussed in section 3. Double Jeopardy, below. While I find the trial court erroneously instructed the jury on a theory not alleged in the indictment, under the Record here the error did not amount to plain error as the jury found the elements elsewhere in the verdict.

In *State v. Harding*, the trial court gave a jury instruction that included the indicted language and additional language. *State v. Harding*, 258 N.C. App. 306, 313, 813 S.E.2d 254, 260, *writ denied*, *review denied*, 371 N.C. 450, 817 S.E.2d 205 (2018). The first-degree kidnapping indictment provided the element of "sexual assault," while the jury instruction provided "it could find [the] defendant guilty if it found 'the [victim] was not released by the defendant in a safe place and/or had been sexually assaulted and/or had been seriously injured.'" *Id.* at 313, 813 S.E.2d at 260. In addition to this instruction, the jury was provided a special verdict sheet with all three elements listed. On the verdict sheet "the jury indicated it found [the] defendant guilty of first-degree kidnapping based on each individual . . . element." *Id.* We found the erroneous instruction did not amount to plain error because "[t]he State presented compelling evidence to support the . . . element of not released in a safe place, and the jury separately found [the] defendant guilty of first-degree kidnapping based on *all* three . . . elements." *Id.* (emphasis added).

Here, the issue before us now becomes whether the jury found the indicted language not provided in the jury instruction elsewhere in its verdict. All the elements of the first-degree kidnapping indictment and the first-degree kidnapping jury instruction were the same apart from the fifth element which elevates the kidnapping charge from second-degree kidnapping to first-degree kidnapping.

Under the kidnapping indictment the final element alleged for the purposes of N.C.G.S. § 14-39(b) is, "[D]efendant also sexually assaulted [Maya] []." However, the jury was instructed it could find Defendant guilty of first-degree kidnapping if it found "that the person was not released by [D]efendant in a safe place." The element alleged in the indictment did not substantially follow the element instructed to the jury. However, this does not amount to plain error if the entirety of the Record discloses the jury found beyond a reasonable doubt Maya was sexually assaulted.

In North Carolina, sexual assault includes sexual offenses and rape. *See State v. Mason*, 317 N.C. 283, 292, 345 S.E.2d 195, 200 (1986) (finding "rape [was] the sexual assault used to elevate kidnapping to first degree."); *see also State v. Freeland*, 316 N.C. 13, 21, 340 S.E.2d 35, 39 (1986) ("[I]n finding [the] defendant guilty of first degree kidnapping the jury must have relied on the rape or sexual offense to satisfy the sexual assault element."). We have also held that it includes taking indecent liberties with a child. *See State v. Stinson*, 127 N.C. App. 252, 257, 489 S.E.2d 182, 186 (1997). The jury found Defendant guilty on two counts of first-degree sexual offense, rape of a child, and two counts of indecent liberties with a child. As the jury found Defendant guilty beyond a reasonable doubt of offenses constituting sexual assault for first-degree kidnapping, there is evidence from the jury's verdict it found beyond a reasonable doubt Maya was sexually assaulted.

In reviewing the entire Record, the jury found Defendant guilty beyond a reasonable doubt of each indicted element of first-degree kidnapping as alleged by the Grand Jury. Defendant has failed to show this instructional error "had a probable impact on the jury's finding that [he] was guilty" of first-degree kidnapping. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (quotation marks omitted).

3. Double Jeopardy

While I find this instructional error did not have a probable impact on the jury's verdict, it did impact Defendant's sentencing. Had Defendant been charged and subsequently sentenced based on the language provided in the first-degree kidnapping indictment, he would have been placed in double jeopardy by sentencing him for both first-degree kidnapping and the underlying sexual assault that was an element of the first-degree kidnapping charge.

Under N.C.G.S. § 14-39, the offense of first-degree kidnapping requires "the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted[.]" N.C.G.S. § 14-39(b) (2019). Our Supreme Court has held in first-degree kidnapping cases based on the element of sexual assault "the legislature did not intend that defendants be punished for both the first degree kidnapping and the underlying sexual assault." *Freeland*, 316 N.C. at 23, 340 S.E.2d at 40-41. In *Freeland*, the defendant was convicted and sentenced on a first-degree rape charge, first-degree sexual offense, and first-degree kidnapping. *Id.* 316 N.C. at 14, 340 S.E.2d at 36. Our Supreme Court held "in finding [the] defendant guilty of first degree kidnapping the jury must have relied on the rape or sexual offense to satisfy the sexual assault

element. As a result [the] defendant was unconstitutionally subjected to double punishment under statutes proscribing the same conduct." *Id.* at 21, 340 S.E.2d at 39; *see also State v. Barksdale*, 237 N.C. App. 464, 474, 768 S.E.2d 126, 132 (2014) (finding violation of double jeopardy where "one of the two sex offense charges must be the basis for th[e] count of first degree kidnapping[]").

Had the jury been correctly instructed on the first-degree kidnapping indictment language and found Defendant guilty of first-degree kidnapping based on sexual assault the trial court could not have sentenced Defendant for all the sexual offenses and the first-degree kidnapping offense without violating double jeopardy. As a result, the instructional error by the trial court affected Defendant's sentencing and we must remand for resentencing. Given the similarity between the convictions here and those in *Stinson*, we are bound to adopt its directions on remand:

> Because it is impossible to determine from the record whether the same sexual acts used for the rape and indecent liberties convictions were the basis of the jury's first degree kidnapping conviction, we cannot ascertain whether either or both of these convictions in combination with the kidnapping conviction is unconstitutional. Rather than arresting judgment on both the rape and indecent liberties convictions, the remedy most consistent with the jury's verdict and the one we order is to arrest judgment on the first degree kidnapping conviction and remand the case to the trial court to resentence [the] defendant for second degree kidnapping. The remaining judgments are not affected.

Stinson, 127 N.C. App. at 258, 489 S.E.2d at 186.

D. Father's Testimony[5]

The Majority finds the cross-examination of Defendant's father to be relevant and concludes Defendant was not prejudiced by the admission of his father's testimony. I dissent as this issue was not preserved for appellate review.

Defendant argues the trial court erred in allowing irrelevant cross-examination of his father. Assuming, *arguendo*, this testimony was irrelevant, this issue was not preserved for review on appeal.

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5. This section corresponds with the Majority Part IV. *Supra* at 215-18.

N.C. R. App. P. 10(a)(1) provides

> to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the *specific grounds* for the ruling the party desired the court to make if the *specific grounds* were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a)(1) (2020) (emphasis added). "A general objection, when overruled, is ordinarily not adequate unless the evidence, considered as a whole, makes it clear that there is no purpose to be served from admitting the evidence." *State v. Patterson*, 249 N.C. App. 659, 664, 791 S.E.2d 517, 521 (2016) (quoting *State v. Jones*, 342 N.C. 523, 535, 467 S.E.2d 12, 20 (1996)).

Here, Defendant only generally objected to the testimony at issue. Defendant's reason for objecting, and the trial court's reason for overruling are not provided in the Record. Additionally, the "specific grounds were not apparent from the context" as the objection could have been related to various issues of admissibility, not just relevancy. N.C. R. App. P. 10(a)(1) (2020). The Record here is unclear as to the grounds for the objection and the trial court's basis for overruling, therefore this issue is not preserved for review and should be dismissed.

Additionally, even assuming, *arguendo*, this issue was preserved for review, if the trial court erroneously admitted this evidence, its admission did not prejudice Defendant. "A new trial will not be ordered automatically each time a court rules erroneously on the admissibility of evidence." *State v. Mebane*, 106 N.C. App. 516, 529, 418 S.E.2d 245, 253 (1992) (citing *State v. Galloway*, 304 N.C. 485, 496, 284 S.E.2d 509, 516 (1981)). "Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001); *see also* N.C.G.S. § 15A-1443(a) (2019).

Here, Defendant has not met his burden of demonstrating that had the erroneously admitted evidence been excluded, there was a reasonable probability a different result would have been reached. A review of the Record and transcripts reveals the testimony of Defendant's father had little impact on the trial. Given the strength of the evidence against Defendant from Maya and Dana's testimony, even assuming, *arguendo*, the father's testimony was irrelevant, Defendant has not demonstrated prejudice.

CONCLUSION

For the reasons stated above, I concur in part, concur in result only in part, and respectfully dissent in part.

STATE OF NORTH CAROLINA
v.
BRENT ALLEN DINGESS, DEFENDANT

No. COA20-188

Filed 15 December 2020

1. Sentencing—aggravating factor—requirement of notice or waiver

The trial court erred by accepting defendant's admission to the existence of an aggravating factor (as part of a plea agreement involving the charge of assault inflicting serious bodily injury) in violation of N.C.G.S. § 15A-1022.1 where the State failed to give defendant the required 30-day written notice of its intent to prove the aggravating factor pursuant to N.C.G.S. § 15A-1340.16(a6), defendant never directly responded when the trial court asked if he waived notice, and defendant never waived his right to a jury trial regarding the aggravating factor.

2. Criminal Law—plea agreement—error in part of plea agreement—entire plea agreement vacated

Where defendant entered into a plea agreement that included an admission of the existence of an aggravating factor, but successfully argued on appeal that he did not receive proper notice of the aggravating factor, the Court of Appeals rejected defendant's argument that the case should be remanded for a new sentencing hearing. Defendant could not repudiate part of the plea agreement without repudiating the whole agreement, and therefore the plea agreement in its entirety was vacated and the matter remanded for disposition.

Judge TYSON concurring in the result only with separate opinion.

Appeal by Defendant from judgment entered 9 October 2019 by Judge Joseph N. Crosswhite in Iredell County Superior Court. Heard in the Court of Appeals 22 September 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Ann Stone, for the State.

Mary McCullers Reece for defendant-appellant.

MURPHY, Judge.

Where a defendant admits to the existence of an aggravating factor, the State must have provided the statutory 30-day notice of its intent to prove the aggravating factor. The trial court shall determine whether notice was provided or whether the defendant waived their right to such notice. Here, the State neither provided notice, nor did Defendant waive his right to notice. Accordingly, we set aside Defendant's aggravated range sentence. However, we hold the entirety of his plea agreement must also be vacated and remanded to the trial court for disposition.

BACKGROUND

Defendant Brent Allen Dingess ("Defendant") was indicted for assault inflicting serious bodily injury resulting from an altercation with Ernest Mudd ("Mudd"). During the altercation, Defendant struck Mudd, causing him to fall and hit his head on an object on the ground. Responding officers found Mudd unconscious, convulsing, and bleeding from the ear. It was later determined Mudd suffered a fractured skull, mandibular condyle fracture, and subdural hematoma as a result of the altercation, leaving him with paralysis in his lower extremities and suffering from dementia. Mudd's injuries rendered him unable to perform his duties, and as a result, he lost his job as caretaker of a mobile home park. Mudd and his wife were evicted from the mobile home provided as part of his compensation, resulting in their living out of their car.

At his plea hearing, Defendant pled guilty to a Class F felony. The trial court determined an aggravating factor existed as a result of Defendant's violation of probation, sentencing him to an active term of 23 to 37 months as a Level II offender. Defendant timely filed written notice of appeal.

ANALYSIS

A. Waiver of Notice

[1] Defendant argues the trial court erred in accepting his admission to the aggravating factor without first confirming he intended to waive the required statutory notice by the State. We agree.

"Alleged statutory errors are questions of law, and as such, are reviewed *de novo*." *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011) (internal citation omitted). Our statutes plainly lay out what is required by the State and trial court when a defendant admits to the existence of an aggravating factor:

> The defendant may admit to the existence of an aggravating factor, and the factor so admitted shall be treated as though it were found by a jury pursuant to the procedures in this subsection. *Admissions of the existence of an aggravating factor must be consistent with the provisions of [N.C.]G.S. 15A-1022.1.* If the defendant does not so admit, only a jury may determine if an aggravating factor is present in an offense.

N.C.G.S. § 15A-1340.16(a1) (2019) (emphasis added). Additionally:

> (a) Before accepting a plea of guilty or no contest to a felony, the court shall determine whether the State intends to seek a sentence in the aggravated range. If the State does intend to seek an aggravated sentence, the court shall determine which factors the State seeks to establish. The court shall determine whether the State seeks a finding that a prior record level point should be found under [N.C.]G.S. 15A-1340.14(b)(7). *The court shall also determine whether the State has provided the notice to the defendant required by [N.C.]G.S. 15A-1340.16(a6) or whether the defendant has waived his or her right to such notice.*
>
> (b) In all cases in which a defendant admits to the existence of an aggravating factor or to a finding that a prior record level point should be found under [N.C.]G.S. 15A-1340.14(b)(7), the court shall comply with the provisions of [N.C.]G.S. 15A-1022(a). In addition, the court shall address the defendant personally and advise the defendant that:
>
> (1) He or she is entitled to have a jury determine the existence of any aggravating factors or points under [N.C.]G.S. 15A-1340.14(b)(7); and
>
> (2) He or she has the right to prove the existence of any mitigating factors at a sentencing hearing before the sentencing judge.

> . . .
>
> (e) The procedures specified in this Article for the handling of pleas of guilty are applicable to the handling of admissions to aggravating factors and prior record points under [N.C.]G.S. 15A-1340.14(b)(7), unless the context clearly indicates that they are inappropriate.

N.C.G.S. §§ 15A-1022.1(a)(b)(e) (2019) (emphasis added). N.C.G.S. § 15A-1340.16(a6) provides:

> The State *must* provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors under subsection (d) of this section or a prior record level point under [N.C.]G.S. 15A–1340.14(b)(7) at least 30 days before trial or the entry of a guilty or no contest plea. A defendant may waive the right to receive such notice. The notice shall list all the aggravating factors the State seeks to establish.

N.C.G.S. § 15A-1340.16(a6) (2019) (emphasis added).

At his hearing, Defendant admitted to the existence of an aggravating factor:

> [DEFENSE COUNSEL]: . . . [H]e agrees that he was in violation of federal probation and finished his time.
>
> THE COURT: And for our purposes, you understand that's an aggravating factor in this case?
>
> [DEFENDANT]: Yes, sir.
>
> THE COURT: And you are admitting to that, right?
>
> [DEFENDANT]: Yes, sir.

As such an admission is controlled by N.C.G.S. § 15A-1022.1, and by implication N.C.G.S. § 15A-1340.16(a6), we examine the Record to determine whether the statutory requirements for accepting Defendant's admission to the aggravating factor were met. N.C.G.S. § 15A-1022.1(a) (2019); N.C.G.S. § 15A-1340.16(a1) (2019).

On appeal, neither party contends the State provided Defendant with written notice of its intent to prove the existence of the aggravating factor at least 30 days prior to trial, as required by N.C.G.S. § 15A-1340.16(a6). Additionally, there is no evidence in the Record to show the State provided Defendant with the required notice. We must then determine

whether, in the alternative, the trial court determined Defendant waived his right to receive such notice. N.C.G.S. § 15A-1022.1(a) (2019).

In *State v. Wright*, the defendant was provided notice of the State's intent to prove the aggravating factor only twenty days prior to trial instead of the required thirty. *State v. Wright*, 265 N.C. App. 354, 361, 826 S.E.2d 833, 838 (2019). Nevertheless, we found the "defendant and his counsel had sufficient information to give an 'intentional relinquishment of a known right[,]'" as evidenced by this exchange:

> THE COURT: The jury having returned verdicts of guilty in Case No. 16CRS13374, 16CRS13373, counts one and two, and 16CRS13375. The State having announced to the [c]ourt that it intends to proceed on aggravating factors in this matter, which is a jury matter. The district attorney has indicated to the [c]ourt that in conference with the defense counsel, that the [d]efendant would stipulate to aggravating factors; is that correct? What says the State?
>
> [STATE:] I do intend to proceed with aggravating factors. I did have a discussion with [Defense Counsel] and indicated his intent was to stipulate to the one aggravating factor that I intended to offer, which was from the AOC form is Factor 12A, that the [d]efendant has during the ten-year period prior to the commission of the offense for which the [d]efendant is being sentenced been found by a court of this state to be in willful violation of the conditions of probation imposed pursuant to a suspended sentence.
>
> THE COURT: All right. Would you -- is that correct?
>
> [DEFENSE COUNSEL]: *That is correct, Your Honor. I've been provided the proper notice and seen the appropriate documents, Your Honor.*

Wright, 265 N.C. App. at 358, 826 S.E.2d at 836-37. The defendant in *Wright* unequivocally waived his right to have a jury determine the existence of the aggravating factor:

> THE COURT: Do you now waive your right to a -- to have the jury determine the aggravating factor?
>
> (Discussion held off the record.)
>
> DEFENDANT: Yes, sir. I'm ready to proceed.

> THE COURT: And do you waive the right to have the jury determine the aggravating factor and do you stipulate to the aggravating factor?
>
> DEFENDANT: Yes, sir.

Id. at 359-60, 826 S.E.2d at 837. We concluded (1) the defendant's "knowing and intelligent" waiver of the right to have a jury determine the aggravating factor; (2) his stipulation to said factor; and (3) prior notice given by the State all supported a finding the defendant waived notice of the State's intent to prove the existence of the aggravating factor. *Id.* at 361, 826 S.E.2d at 838.

Here, those factors are not present. As stated previously, (1) the Record gives no indication the State provided Defendant with notice of its intent to prove the existence of the aggravating factor, as required by N.C.G.S. § 15A-1340.16(a6), prior to the 30-day timeframe or otherwise. N.C.G.S. § 15A-1340.16(a6) (2019). As a result, Defendant did not enjoy the same level of "sufficient information to give an 'intentional relinquishment'" of his right to notice, as was true of the defendant in *Wright*. *Wright*, 265 N.C. App. at 361, 826 S.E.2d at 838. Further, (2) while the trial court did inquire as to whether Defendant waived his right to notice, Defendant never directly answered the question:

> THE COURT: Have you admitted to the existence of the following aggravating factors: That being that within 10 years of the date of this offense you were in violation of the terms of your probation, and do you understand that you are waiving any notice the State may have with regard to that aggravating factor?
>
> [DEFENSE COUNSEL]: Your Honor, just did speak with Mr. D.A. He was on federal probation. He was violated and he served time, and I believe that's what Mr. D.A. was referring to.
>
> THE COURT: Is that correct, Mr. D.A.?
>
> [STATE]: Yes, that would be one of them. I think it was something out of state court also.
>
> [DEFENSE COUNSEL]: But he completed the state probation, but he agrees that he was in violation of federal probation and finished his time.
>
> THE COURT: And for our purposes, you understand that's an aggravating factor in this case?

> [DEFENDANT]: Yes, sir.

A thorough examination of the transcript reveals the trial court did not revisit the subject and therefore never obtained a clear answer as to whether Defendant waived his statutory right to notice, under N.C.G.S. § 15A-1022.1(a). N.C.G.S. § 15A-1022.1(a) (2019). And (3), although not required by statute, Defendant also never waived his right to a jury trial on the factor, further distinguishing him from the defendant in *Wright*:

> THE COURT: Understand you have a right to plead not guilty and be tried by a jury?
>
> THE DEFENDANT: Yes, sir.
>
> . . .
>
> THE COURT: Do you understand at a jury trial you have the right to have a jury determine the existence of any aggravating factors that may apply to your case?
>
> THE DEFENDANT: Yes, sir.

While here Defendant reiterated his understanding of his right to a jury trial, he did not explicitly waive it, as opposed to the defendant in *Wright*. *Wright*, 265 N.C. App. at 359-60, 826 S.E.2d at 837. Rather, the circumstances here most resemble *State v. Snelling*, where we determined the trial court committed error as it was

> never determined whether the statutory requirements of N.C.[G.S.] § 15A–1340.16(a6) were met. Additionally, there is no evidence in the record to show that the State provided sufficient notice of its intent to prove the probation point. Moreover, the record does not indicate that [the] defendant waived his right to receive such notice.

State v. Snelling, 231 N.C. App. 676, 682, 752 S.E.2d 739, 744 (2014).

The language of N.C.G.S. §§ 15A-1340.16(a6) and 15A-1022.1(a) is clear: "[t]he State *must* provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors," and "[t]he [trial] court *shall* also determine whether the State has provided the notice to the defendant . . . or whether the defendant has waived his or her right to such notice." N.C.G.S. § 15A-1340.16(a6) (2019) (emphasis added); N.C.G.S. § 15A-1022.1(a) (2019) (emphasis added). As Defendant did not receive prior notice of the State's intent to prove the existence of the aggravating factor, nor did he waive his right to such notice, we find the trial court's conclusion "[t]he State has provided [Defendant]

with appropriate notices to the aggravating factors, and [Defendant] has waived notice to those aggravating factors" to be in error.

B. Remedy

[2] Defendant requests we vacate and remand for a new sentencing hearing. However, a "[d]efendant cannot repudiate [a plea agreement] in part without repudiating the whole." *State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (Steelman, J., dissenting in part), *rev'd for reasons stated in dissent*, 366 N.C. 327, 734 S.E.2d 571 (2012). As part of his plea agreement with the State, Defendant agreed to admit to the existence of the aggravating factor, opening up the possibility of receiving a sentence in the aggravated range. Defendant now seeks to have the benefit of the plea agreement without living up to his end of the bargain, which originally included the possibility of an aggravated sentence.

> In the instant case, essential and fundamental terms of the plea agreement were unfulfillable. Defendant has elected to repudiate a portion of his agreement. Defendant cannot repudiate in part without repudiating the whole. . . . The entire plea agreement must be set aside, and this case remanded to the Superior Court of [Iredell] County for disposition on the original charge of [assault inflicting serious bodily injury].

Id. (internal citation omitted).

CONCLUSION

The trial court erred in determining Defendant was provided with and waived his right to notice of the State's intent to prove the existence of the aggravating factor. As we are setting aside part of Defendant's plea agreement, we accordingly vacate the agreement in its entirety and remand for disposition.

VACATED AND REMANDED.

Judge DIETZ concurs.

Judge TYSON concurs in result only, with separate opinion.

TYSON, Judge, concurring in the result.

I concur in the result reached by the majority's opinion. The aggravating factor the State proceeded upon at sentencing, and to which

Defendant's counsel agreed, was neither alleged in an indictment nor an information. The enhanced sentence, entered beyond the presumptive range, constitutes prejudicial error to vacate Defendant's sentence.

I concur with that portion of the majority's analysis that a "Defendant cannot repudiate [a plea agreement] in part without repudiating the whole." *State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (Steelman, J., dissenting in part), *rev'd for reasons stated in dissent*, 366 N.C. 327, 734 S.E.2d 571 (2012). I vote to vacate the sentence and remand for trial on the following basis.

I. N.C. Gen. Stat. § 15A-1022.1

The Due Process Clause of the Fifth Amendment and the notice and jury trial protections of the Sixth Amendment, applicable to the states, guarantee that "[a]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 476, 147 L. Ed. 2d 435, 446 (2000) (citations omitted). The North Carolina General Assembly codified these protections within N.C. Gen. Stat. § 15A-1340.16 (2019).

The Supreme Court of the United States applied *Apprendi's* requirements to the sentencing phase following a guilty plea in *Blakely v. Washington*. 542 U.S. 296, 305, 159 L. Ed. 2d 403, 414 (2004).

North Carolina's statutes codify and expand *Blakely's* protections in N.C. Gen. Stat. § 15A-1022.1 (a)-(e), which provide:

> (a) Before accepting a plea of guilty or no contest to a felony, the court shall determine whether the State intends to seek a sentence in the aggravated range. If the State does intend to seek an aggravated sentence, the court shall determine which factors the State seeks to establish. The court shall determine whether the State seeks a finding that a prior record level point should be found under G.S. 15A-1340.14(b)(7). *The court shall also determine* whether the State has provided the notice to the defendant required by G.S. 15A-1340.16(a6) or *whether the defendant has waived his or her right to such notice.*
>
> (b) *In all cases in which a defendant admits to the existence of an aggravating factor* or to a finding that a prior record level point should be found under G.S. 15A-1340.14(b)(7), *the court shall comply* with the provisions of G.S. 15A-1022(a). *In addition, the court*

> *shall address the defendant personally and advise the defendant that*:
>
> (1) He or she is entitled to have a jury determine the existence of any aggravating factors or points under G.S. 15A-1340.14(b)(7); and
>
> (2) He or she has the right to prove the existence of any mitigating factors at a sentencing hearing before the sentencing judge.
>
> (c) Before accepting an admission to the existence of an aggravating factor or a prior record level point under G.S. 15A-1340.14(b)(7), *the court shall determine* that there is a factual basis for the admission, and that the admission is the result of an informed choice by the defendant. The court may base its determination on the factors specified in G.S. 15A-1022(c), as well as any other appropriate information.
>
> (d) *A defendant may admit to the existence of an aggravating factor* or to the existence of a prior record level point under G.S. 15A-1340.14(b)(7) *before or after the trial of the underlying felony.*
>
> (e) *The procedures* specified in this Article for the handling of pleas of guilty *are applicable to the handling of admissions to aggravating factors* and prior record points under G.S. 15A-1340.14(b)(7), unless the context clearly indicates that they are inappropriate.

N.C. Gen. Stat. § 15A-1022.1 (a)-(e) (2019) (emphasis supplied).

Our General Assembly extended *Blakely's* protections to the admission of aggravating factors or prior record level points, even in the absence of an underlying guilty plea. *See id.* The transcript shows the trial court failed to address Defendant personally.

This Court has interpreted N.C. Gen. Stat. § 15A-1022.1 to "require[] a trial court to inform a defendant of his or her right to have a jury determine the existence of an aggravating factor, and the right to prove the existence of any mitigating factor." *State v. Wilson-Angeles*, 251 N.C. App. 886, 902, 795 S.E.2d 657, 669 (2017) (citation omitted).

Unlike the requirements of N.C. Gen. Stat. § 15A-1340.16(a1) cited by the majority's opinion, the trial court's failure to inquire personally into a knowing and voluntarily waiver of Defendant's rights prejudiced

Defendant. Under subsections (c) and (d), we must reconcile the express statutory language that: "A defendant may admit to the existence of an aggravating factor . . . *before or after the trial of the underlying felony*" with "Before accepting an admission to the existence of an aggravating factor . . . , the court shall determine that there is a factual basis for the admission, and that the admission is the result of an informed choice by the defendant." N.C. Gen. Stat. § 15A-1022.1 (c), (d) (emphasis supplied).

A. Canons of Construction

"The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citation omitted). "The best indicia of that intent are the [plain meanings of the] language of the statute . . ., the spirit of the act and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citations omitted).

"When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself." *State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010). "Interpretations that would create a conflict between two or more statutes are to be avoided, and statutes should be reconciled with each other whenever possible." *Taylor v. Robinson*, 131 N.C. App. 337, 338, 508 S.E.2d 289, 291 (1998) (citation, internal quotation marks, and ellipses omitted).

"'[S]tatutes *in pari materia* must be read in context with each other.'" *Publishing v. Hospital System, Inc.*, 55 N.C. App. 1, 7, 284 S.E.2d 542, 546 (1981) (quoting *Cedar Creek Enters. Inc. v. Dep't of Motor Vehicles*, 290 N.C. 450, 454, 226 S.E.2d 336, 338 (1976)). "'*In pari materia*' is defined as '[u]pon the same matter or subject.'" *Id.* at 7-8, 284 S.E.2d at 546 (quoting Black's Law Dictionary 898 (4th ed. 1968)).

My review of relevant case and statutory authority fails to disclose any authority interpreting N.C. Gen. Stat. § 15A-1022.1(d) as nullifying a defendant's admission under N.C. Gen. Stat. § 15A-1022.1(c). Reconciling both statutory subsections with *Blakely* and *Apprendi*, a defendant can both waive prior notice and admit to the presence and applicability of an aggravating factor or prior record level both before and after the guilt-innocence phase after being provided the applicable protections of N.C. Gen. Stat. § 15A-1022.1(a)-(c), *Blakely*, and *Apprendi*. These protections are: "that there is a factual basis for the admission, and that the admission is the result of an informed choice by the defendant." N.C. Gen. Stat. § 15A-1022.1(c). Generally, these protections must be personally addressed to and waived by the defendant. *Id.*

II. Conclusion

The indictment failed to allege and the State never proved the aggravating factor, as is required by *Apprendi*, *Blakely*, and N.C. Gen. Stat. § 15A-1340.16(a1). Upon remand, N.C. Gen. Stat. § 15A-1022.1(a)-(e) sets out the procedures for the disposition for resentencing, not N.C. Gen. Stat. § 15A-1340.16(a1).

This waiver allowed the court to exceed the presumptive range and impose the maximum aggravated sentence and constitutes prejudice. The sentence is properly vacated. *See Rico*, 218 N.C. App. at 122, 720 S.E.2d at 809 (Steelman, J., dissenting in part), *rev'd for reasons stated in dissent*, 366 N.C. 327, 734 S.E.2d 571. Upon remand, a "Defendant cannot repudiate [a plea agreement] in part without repudiating the whole." *Id.*

The State is free to pursue any charges and aggravating factors applicable in the case in compliance with the statutes, without regard to the vacated plea agreement. *Id.*

I concur in the result to remand to the trial court for a new trial or for entry of a plea agreement that follows the statutes. N.C. Gen. Stat. § 15A-1022.1(a)-(e).

STATE OF NORTH CAROLINA
v.
MICHAEL SHANE FALLS, DEFENDANT

No. COA20-40

Filed 15 December 2020

Search and Seizure—knock and talk doctrine—scope of implied license to approach—curtilage of home—walk through front yard at night

The trial court erred by denying defendant's motion to suppress drugs, drug paraphernalia, and a firearm seized by law enforcement officers after they approached defendant's house—which had a visible no trespassing sign outside—intending to conduct a knock and talk in response to an anonymous tip about drugs. The officers violated defendant's Fourth Amendment right against unreasonable searches where their conduct exceeded the implied license allowed an ordinary citizen to approach a stranger's house. The officers

parked at an adjacent property at 9:30 at night and, after seeing a man get into a car and start backing out of the driveway, quickly cut through defendant's front yard using trees as cover, and surrounded and shone flashlights at the car.

Judge BERGER dissenting.

Appeal by Defendant from judgments entered 20 May 2019 by Judge Daniel A. Kuehnert in Gaston County Superior Court. Heard in the Court of Appeals 7 October 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General J. Aldean Webster, III, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Hitchcock, for Defendant.

BROOK, Judge.

This case presents the following question: are three law enforcement officers wearing dark clothing impliedly licensed to cut across a person's front yard, swiftly passing a no trespassing sign, and emerge from trees they were using for cover and concealment in order to illuminate, surround, and stop that person's departing car at 9:30 p.m. on a dark, cold mid-December evening? Or does this conduct instead implicate the Fourth Amendment? Common sense tells us no Girl Scouts would attempt such audacious efforts in peddling their cookies. Accordingly, we must suppress the fruits of the officers' unconstitutional search in this case.

I. Factual Background and Procedural History

At the suppression hearing, Gastonia Police Officer Clarence Belton testified that he received an anonymous drug complaint that Michael Shane Falls ("Defendant") was selling and growing marijuana out of his home. Officer Belton also received information that Defendant carried a silver revolver and determined that Defendant was a convicted felon.

The next day, 16 December 2017, law enforcement decided to conduct a knock and talk to "further investigate the complaint based on the details" they had received. Around 9:30 p.m. on that "extremely cold" night, Officer Belton, along with Officers J.C. Padgett and S.D. Hoyle, went to Defendant's house to conduct their investigation despite the fact that "[they] usually do the knock and talks . . . during the daylight hours."

The officers parked in a church parking lot next to Defendant's house. They then walked where "the road meets the [Defendant's] property line[,]" or what they later termed walking on the property's right-of-way. Officer Belton then saw "a white male get inside of a vehicle" and told Officers Padgett and Hoyle that he was "possibly our suspect."

Wanting to make contact with him before he left, the officers made a beeline for Defendant's car. In so doing, they cut into Defendant's front yard and "between the tree[s] to go straight to the vehicle. [ ] [I]t g[a]ve [them] cover and concealment as well, just in case there was an issue." The officers "walked swiftly over to th[e] vehicle," passing a no trespassing sign that none of them appreciated in the moment. The car was running and starting to reverse out of the driveway, and, as the officers approached, they turned on their flashlights and shined them at Defendant's vehicle. Officers Belton and Padgett went to the driver side window while Officer Hoyle went around to the passenger side. Officer Belton immediately noticed a silver revolver lying in the passenger seat and within a few seconds also smelled "a pungent odor of marijuana coming from the vehicle" on the driver side.

Officer Belton asked Defendant if he lived at the house and what his name was before telling him they had received a drug complaint. He then asked Defendant to step out of the vehicle and conducted a *Terry* frisk of Defendant for weapons. According to Officer Belton, Defendant was "very belligerent . . . [and] didn't like the fact that we were there" and called someone on his cell phone; at that point, Officer Belton put Defendant in handcuffs because he was not listening to commands. Officer Padgett then recovered the gun from the vehicle and saw several vials in the driver door, which he identified based on their odor and color as THC oil.

Afterwards, Officers Belton and Padgett went to the front door of the residence and knocked several times. Within a few minutes, Defendant's fiancée, Summer Bolt, came outside to speak with the officers. When she opened the door, Officer Belton testified that he could smell the odor of marijuana coming out of the residence. Ms. Bolt did not consent to a search of the residence, so Officer Padgett applied for and received a search warrant. Once Officer Padgett returned with the warrant, he read it to Defendant and Ms. Bolt, and then the officers executed the warrant. Marijuana, paraphernalia, a pill that field-tested positive for methamphetamine, and counterfeit $100 bills were found in the home.

Defendant was charged with possession of methamphetamine, possession of counterfeit instruments, and possession of a firearm by a felon. Defendant moved to suppress, and, during that hearing,

Officer Padgett testified as follows regarding how people might access Defendant's front door:

> The sidewalk would be what anybody that was going door-to-door selling anything would take, they would go down -- up the little sidewalk that jets off the driveway[.]
>
> . . .
>
> There was not a worn path in the grass [where we walked], or anything like that. I would think anybody, especially if you parked your vehicle on the roadway, you would go down the driveway. We did -- just because of the freedom of movement, and stuff, we're not going [to] block the driveway. We don't like parking our patrol cars on the road. So that's why we took the path we did. If you were in a mail truck you would probably stop at the driveway and go down the sidewalk to the door. But that's not the path that we took.

Officer Belton further testified that "due to the fact [of] it being dark, there's no lights right there, and us wearing dark clothing, we didn't want to be struck by a vehicle just doing a simple knock and talk."

Judge Kuehnert denied the motion to suppress by written order on 6 November 2019. The trial court made the following pertinent findings of fact:

> 7. . . . [O]fficers decided to conduct a "knock and talk" at 2300 Davis Park Road to further investigate the information provided by the anonymous tipster.
>
> 8. At approximately 9:30 p.m. on December 16, Officers Belton, Padgett, Hoyle and Lewis arrived at 2300 Davis Park Road and parked in the adjacent church parking lot.
>
> 9. The officers walked along the highway right-of-way by the house on the grass portion of the highway as they walked up to the driveway.
>
> 10. The house could be approached by walking up the driveway, which was obvious, or through the yard, which was not obvious.
>
> 11. At the end of the driveway was a sidewalk that ran parallel to the house and up to the front door.

12. There was a "no trespassing" sign posted on a tree in front of the property.[1]

13. As [ ] [O]fficers Padgett and Belton approached the driveway along the grass right-of-way they noticed a white male in a Honda Civic start to back up[ ] (this was indicated because the backup lights came on the vehicle).

14. The officers passed the front door of the house but did not go directly to the front door because there was no obvious path.

15. All of the officers involved then walked over towards the vehicle cutting through the yard approximately 10-20 feet.

16. Officer Belton arrived at the vehicle on the driver side and Officer Padgett was right behind. Officer Hoyle went to the passenger side of the vehicle.

17. As [Officer] Belton arrived he noticed the window was rolled down and began speaking to the individual.

18. The individual identified himself as Michael Shane Falls.

19. Almost immediately, Officers Belton and Padgett noticed an odor of marijuana emanating from the vehicle.

20. At the same time, Officer Hoyle, on the passenger side of the vehicle noticed a silver handgun in plain view on the passenger side of the vehicle.

. . .

24. [Defendant] advised that his fiancé[e], Summer Bolt, was in the residence.

25. [ ] [O]fficer Padgett walked up the driveway to the sidewalk that was perpendicular to the house and walked up to the front door.

. . .

27. According to testimony from [O]fficers Padgett and Belton, approximately 2-3 minutes later, Ms. Bolt came to

1. This finding is unchallenged and thus binding on us on appeal; we also note that the record reflects Defendant had an additional no trespassing sign in his front yard.

> the door. Upon the door opening, Officer[s] Padgett and Belton noticed an odor of marijuana.

The trial court then made the following pertinent conclusions of law:

> 39. A knock and talk is valid so long as it is reasonable and does not violate the normal customs of an invitation and is not physically intrusive. (*Jardines*, at 1416).
>
> . . .
>
> 41. In the present case, Officer's [sic] Padgett, Belton and Hoyle testified that [ ] they approached the driveway of 2300 Davis Park Road along the right of way open to the public along the side of the road.
>
> 42. Officer Belton also testified that himself, Padgett and Hoyle passed the front of the front door by the house. However, there was to [sic] sidewalk or direct path to the door, so the officers continued to the driveway adjacent to the front door.
>
> 43. In walking along the right-of-way, the officers followed a path that a person visiting 2300 Davis Park Road would follow if that individual was going to knock on the front door of the house.
>
> 44. That [ ] when Officer Padgett saw a white male getting into a car and the br[ake] lights turn on, they immediately cut across the normal path into the curtilage of the yard at 2300 Davis Park Road. Officer Belton testified that he believed that [the] individual was the owner of the house and wanted to talk to him about the drug complaint.
>
> . . .
>
> 46. Even though the police officers briefly entered the curtilage of the property[,] it was for talking to the potential homeowner leaving in their car.
>
> 47. That the intrusion on the curtilage of the property was brief and minimal. Further, the officers did not use any special equipment or use any special force to enter the property. As a result, it was not an unreasonable intrusion and therefore did not violate the Fourth Amendment to the United States Constitution.

On 20 May 2019, Defendant pleaded guilty to all charges, reserving his right to appeal the denial of the motion to suppress. Judge Kuehnert consolidated the charges and sentenced Defendant to 17 to 30 months' imprisonment, suspended upon 60 months' supervised probation and a 90-day split sentence. Defendant timely noticed appeal.

II. Analysis

On appeal, Defendant argues that the trial court erred in denying his motion to suppress because the officers exceeded the scope of the implied license to conduct a knock and talk and therefore were not lawfully present when they observed contraband in his vehicle. Defendant also argues that the trial court sentenced him incorrectly.

We agree with Defendant that the trial court erred in denying his motion to suppress and therefore do not reach the issue of whether he was sentenced correctly.

A. Standard of Review

Our review of a trial court's denial of a motion to suppress "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "In addition, the trial court's unchallenged findings of fact are binding on appeal." *State v. Ramseur*, 226 N.C. App. 363, 366, 739 S.E.2d 599, 602 (2013). "This Court reviews conclusions of law stemming from the denial of a motion to suppress *de novo*. . . . Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Borders*, 236 N.C. App. 149, 157, 762 S.E.2d 490, 498-99 (2014) (citation omitted).

B. Governing and Persuasive Authority

The Fourth Amendment to the United States Constitution and Article 1, Section 20 of the North Carolina Constitution protect against unreasonable searches. U.S. Const. amend. IV; N.C. Const. art. I, § 20. "[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Florida v. Jardines*, 569 U.S. 1, 6, 133 S. Ct. 1409, 1414, 185 L. Ed. 2d 495, 501 (2013) (internal marks and citation omitted). "While law enforcement officers need not shield their eyes when passing by the home on public thoroughfares, an officer's leave to gather information is

sharply circumscribed when he steps off those thoroughfares and enters the Fourth Amendment's protected areas." *Id.* at 7, 133 S. Ct. at 1415 (internal citation and marks omitted). This constitutional protection extends to the "curtilage," which is "the area immediately surrounding and associated with the home[.]" *Id.* at 6, 133 S. Ct. at 1414 (internal citation and marks omitted).

"A knock and talk is a procedure by which police officers approach a residence and knock on the door to question the occupant, often in an attempt to gain consent to search when no probable cause exists to obtain a warrant." *State v. Marrero*, 248 N.C. App. 787, 790, 789 S.E.2d 560, 564 (2016). While a knock and talk does not implicate the Fourth Amendment, *see Kentucky v. King*, 563 U.S. 452, 469-70, 131 S. Ct. 1849, 1862, 179 L. Ed. 2d 865, 880-81 (2011), it is, of course, a tactic employed "for the purpose of gathering evidence[,]" *Jardines*, 569 U.S. at 21, 133 S. Ct. at 1423 (Alito, J., dissenting). But "[w]hen the Government obtains information by *physically intruding* on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred." *Id.* at 5, 133 S. Ct. at 1414 (internal marks omitted) (emphasis added) (quoting *United States v. Jones*, 565 U.S. 400, 406-07 n.3, 132 S. Ct. 945, 950-51 n.3, 181 L. Ed. 2d 911, 919 n.3 (2012)); *see also People v. Frederick*, 500 Mich. 228, 235 n.2, 895 N.W.2d 541, 544 n.2 (2017) ("The violation of [the defendant's] property rights, combined with the subsequent information-gathering, constituted a search.").

In *Jardines*, the Supreme Court utilized a property-rights framework to assess whether the use of a drug-sniffing dog on a homeowner's porch to investigate the contents of the defendant's home was a search within the meaning of the Fourth Amendment. Holding first that the porch was "part of the home itself for Fourth Amendment purposes[,]" the Court then turned to whether the officers' investigation "was accomplished through an unlicensed physical intrusion." 569 U.S. at 6-7, 133 S. Ct. at 1414-15. Concluding that it was, the Court held that law enforcement may not act outside the scope of the "implicit license [which] typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Id.* at 8, 133 S. Ct. at 1415.

Writing for the majority, Justice Scalia noted that "[c]omplying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters." *Id.*

> To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor

> exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police. The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose. Consent at a traffic stop to an officer's checking out an anonymous tip that there is a body in the trunk does not permit the officer to rummage through the trunk for narcotics. Here, the background social norms that invite a visitor to the front door do not invite him there to conduct a search.

Id. at 9, 133 S. Ct. at 1416. Justice Scalia emphasized that

> [i]t is not the dog that is the problem, but the behavior that here involved use of the dog. We think a typical person would find it "a cause for great alarm" . . . to find a stranger snooping about his front porch *with or without* a dog.

Id. at 9 n.3, 133 S. Ct. at 1416 n.3 (internal citation omitted). Put simply, bloodhound or not, law enforcement can do no more than the ordinary citizen would be expected to do. *Id.* at 8, 133 S. Ct. at 1416 ("[A] police officer not armed with a warrant may approach a home and knock, precisely because that is '*no more than any private citizen might do*.'") (emphasis added) (citation omitted).

Pursuant to the precedent established by the Supreme Court in *Jardines*, our appellate courts have underlined "the right of police officers to conduct knock and talk investigations, so long as they do not rise to the level of Fourth Amendment searches." *Marrero*, 248 N.C. App. at 790-91, 789 S.E.2d at 564. "This limitation is necessary to prevent the knock and talk doctrine from swallowing the core Fourth Amendment protection of a home's curtilage." *State v. Huddy*, 253 N.C. App. 148, 152, 799 S.E.2d 650, 654 (2017). We have emphasized that the implied license "extends only to the entrance of the home that a 'reasonably respectful citizen' unfamiliar with the home would believe is the appropriate door at which to knock." *Id.* (quoting *Jardines*, 569 U.S. at 8 n.2, 133 S. Ct. at 1415 n.2); *see also id.* at 155, 799 S.E.2d at 656 (Tyson, J., concurring) ("[E]ven a seldom-used front door is the door uninvited members of the public are expected to use when they arrive."). "Without this limitation, law enforcement freely could wander around one's home searching for exterior doors and, in the process, search any area of a home's curtilage without a warrant." *Id.* at 152, 799 S.E.2d at 654.

The scope of the implied license to conduct a knock and talk is governed by societal expectations, and when law enforcement approach a home in a manner that is not "customary, usual, reasonable, respectful, ordinary, typical, nonalarming," they are trespassing, and the Fourth Amendment is implicated. *Jardines*, 569 U.S. at 8 n.2, 133 S. Ct. at 1415 n.2. Relevant to distinguishing between a knock and talk and a search is how law enforcement approach the home, the hour at which they did so, and whether there were any indications that the occupant of the home welcomed uninvited guests on his or her property.

First, law enforcement may not approach a home in a manner that "would not have been reasonable for solicitors, hawkers[,] or peddlers." *State v. Stanley*, 259 N.C. App. 708, 717, 817 S.E.2d 107, 113 (2018) (citation and marks omitted) ("Rather than using the paved walkway that led directly to the unobstructed front door of the apartment, the officers walked along a gravel driveway into the backyard in order to knock on the back door, which was not visible from the street."); *see also Huddy*, 253 N.C. App. at 153, 799 S.E.2d at 655 (impermissible knock and talk where officer walked around the entire residence to "clear" the sides of the home, checked the windows for signs of a break-in, and then approached the home from the back door). Similarly, law enforcement cannot "overstay[ ] their 'knock and talk' welcome on the property." *State v. Ellis*, 266 N.C. App. 115, 121, 829 S.E.2d 912, 916 (2019) (violation of Fourth Amendment where detective received no response after knocking on front door and second detective walked around to rear door and then to sides of the defendant's yard); *see also State v. Gentile*, 237 N.C. App. 304, 309-10, 766 S.E.2d 349, 353 (2014) (detectives engaged in "trespassory invasion of defendant's curtilage" where they knocked on front door, received no response, and then proceeded to back of house where they smelled the odor of marijuana).

Relatedly, the hour at which officers conduct their knock and talk is relevant to whether officers have exceeded the scope of the implied license. While this Court has not held that knock and talks are impermissible during a certain time-window, we have approvingly noted that "a number of courts have found late-night inquiries unreasonable because of the societal expectation that members of the public would not knock on one's front door in the middle of the night." *State v. Hargett*, 251 N.C. App. 926, 795 S.E.2d 828, 2017 N.C. App. LEXIS 70, at *6 (2017) (unpublished). Even the dissent in *Jardines* acknowledged that "as a general matter . . . a visitor [may not] come to the front door in the middle of the night without an express invitation." 569 U.S. at 20, 133 S. Ct. at 1422 (Alito, J., dissenting). Noting agreement on this point between the majority and dissenting opinions in *Jardines*, the Michigan Supreme

Court unanimously concluded "that a nighttime visit would be outside the scope of the implied license (and thus a trespass)." *Frederick*, 500 Mich. at 238, 895 N.W.2d at 546. Accordingly, "as the Supreme Court suggested in *Jardines*, [ ] the scope of the implied license to approach a house and knock is time-sensitive" and assessed by reference to whether Girl Scouts would do so at the hour in question. *Id.*

Finally, we consider whether a resident has signaled that uninvited guests are not welcome to approach his or her home. Even before *Jardines*, we noted that plainly visible no trespassing signs are "evidence of the homeowner's intent that the [area protected by the sign is] not open to the public[,]" regardless of whether officers have seen the sign or not. *State v. Pasour*, 223 N.C. App. 175, 179, 741 S.E.2d 323, 326 (2012). While a sign alone may not be "sufficient to revoke the implied license[,]" it is one factor to be considered among others, such as the presence of a consistently locked gate or fence and the homeowner or occupant's conduct upon the officers' arrival. *State v. Smith*, 246 N.C. App. 170, 178, 783 S.E.2d 504, 510 (2016). In *Smith*, we held that the presence of a sign alone did not expressly revoke the implied license where the defendant "emerged from his home and greeted the detectives and deputy" and "engaged them in what the record reflects was a calm, civil discussion." *Id.* at 179, 783 S.E.2d at 510; *see also Huddy*, 253 N.C. App. at 151, 799 S.E.2d at 654 ("[O]fficers are permitted to approach the front door of a home, knock, and engage in *consensual* conversation with the occupants.") (emphasis added). We also noted that the defendant had inconsistently displayed a no trespassing sign and the gate to his driveway was open on the date the officers arrived, all of which "did not reflect a clear demonstration of an intent to revoke the implied license to approach." *Smith*, 246 N.C. App. at 179, 783 S.E.2d at 510 (internal marks omitted).

This guidance is pertinent here because "an officer must have a lawful right of access to any contraband he discovers in plain view in order to seize it without a warrant" and thus "[a] plain-view seizure [ ] cannot be justified if it is effectuated by unlawful trespass." *Collins v. Virginia*, ___ U.S. ___, ___, 138 S. Ct. 1663, 1672, 201 L. Ed. 2d 9, 21 (2018) (citation omitted). If law enforcement goes beyond the bounds of a knock and talk and, in so doing, sees or smells contraband, then, absent an applicable exception to the warrant requirement, they do not have the right to seize that evidence. *Id.* Accordingly, evidence seized pursuant to a knock and talk that has strayed into a search must be suppressed as fruit of the poisonous tree. *See Stanley*, 259 N.C. App. at 718, 817 S.E.2d at 114.

C. Application to the Instant Case

Since the scope of the implied license is governed by "background social norms," a knock and talk does not implicate the Fourth Amendment so long as officers behave as a Girl Scout or trick-or-treater would. The officers here decidedly did not.

The trial court found and Defendant challenges on appeal the following findings of fact:

> 10. The house could be approached by walking up the driveway, which was obvious, or through the yard, which was not obvious.
>
> . . .
>
> 14. The officers passed the front door of the house but did not go directly to the front door because there was no obvious path.

Defendant also challenges the following conclusion of law:[2]

> 43. In walking along the right-of-way, the officers followed a path that a person visiting 2300 Davis Park Road would follow if that individual was going to knock on the front door of the house.

Turning to the evidence presented at the suppression hearing, Officer Padgett testified explicitly as to the path that the ordinary person would take and the reasons why he and Officers Belton and Hoyle did not take that path:

> The sidewalk would be what anybody that was going door-to-door selling anything would take, they would go down -- up the little sidewalk that juts off the driveway[.]
>
> . . .
>
> There was not a worn path in the grass [where we walked], or anything like that. *I would think anybody, especially if you parked your vehicle on the roadway, you would go down the driveway.* We did -- just because of the freedom of movement, and stuff, we're not going up block the driveway. We don't like parking our patrol cars on the

2. Though labeled a conclusion of law, this is more properly classified as a finding of fact because it is a determination reached through "logical reasoning from evidentiary facts." *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657-58 (1982).

> road. So that's why we took the path we did. *If you were in a mail truck you would probably stop at the driveway and go down the sidewalk to the door. But that's not the path that we took.* (Emphasis added.)

And Officer Belton testified that they took a different path because "of vehicles coming by, and the fact that the night being dark and us wearing dark clothing." He also testified that they "went straight to the driveway" because he saw "a white male getting inside a vehicle, possibly [the] suspect." To get to the driveway, the officers "cut between the tree to go straight to the vehicle. [ ] [I]t g[a]ve us cover and concealment as well, just in case there was an issue." There was no testimony to the contrary on any of these points.

While the above testimony is competent evidence in support of finding of fact 10 as persons *could* approach the house through its yard, it offers no support for finding of fact 14 or conclusion of law 43. The testimony from the suppression hearing conclusively established that the officers did *not* follow the path that "a person visiting 2300 Davis Park Road *would* follow if that individual was going to knock on the front door of the house." (Emphasis added.) Instead of "stop[ping] at the driveway and go[ing] down the sidewalk to the door"—like "anybody" would do—the officers took a path that offered them "cover[,] [ ] concealment[,]" and safety since they were out at night in dark clothing. And Officer Belton specifically testified that they did not go to the front door because they saw Defendant getting into his car—not because there was no "obvious path" to the front door.

The unbidden deviations from the ordinary path that the officers took here for the purposes of obtaining information are of the type that our Court has held time and time again violate the Fourth Amendment. *See*, *e.g.*, *Stanley*, 259 N.C. App. at 717, 817 S.E.2d at 113 (unlawful knock and talk where officers ignored paved walkway to front door and walked along gravel driveway to back door); *see also Huddy*, 253 N.C. App. at 149, 799 S.E.2d at 652 (same where officers walked around the entire residence before proceeding to back of house to knock). But this case presents far more than a 10- to 20-foot intrusion into Defendant's front yard.

First, the manner in which the officers approached the home here, including but not limited to the physical intrusion, was contrary to that of the "reasonably respectful citizen." Instead of parking in Defendant's driveway, they parked in a lot beside Defendant's home. Clad in dark clothing, the three officers walked along Defendant's property line.

Then, when they saw Defendant enter his car, they briskly crossed onto his property, cutting through trees because it gave them "cover and concealment[,]" shining flashlights at and surrounding his *moving* vehicle. While the State granted at oral argument such behavior would mark Girl Scouts as "ambitious," this conduct, as Justice Scalia put it, "would inspire most of us to—well, call the police[,]" *Jardines*, 569 U.S. at 9, 133 S. Ct. at 1416, if not resort to self-defense.

Relatedly, the officers here also conducted their "knock and talk" at 9:30 p.m. on a cold, mid-December night. Ordinary citizens are not generally expected so late at night. In fact, this was out of the ordinary even for these officers, who testified that their usual practice was to conduct knock and talks during the daylight hours. The atypical, potentially alarming time of this investigation is difficult to square with the implied license discussion in *Jardines*. *Id.* at 8 n.2, 133 S. Ct. at 1415 n.2.[3]

Not only was the manner and time contrary to that of the "reasonably respectful citizen," there also was a plainly visible no trespassing sign in Defendant's yard, evincing an intent to signal that the front yard was not open to the public. *Jardines*, 569 U.S. at 8 n.2, 133 S. Ct. at 1415 n.2; *see also Pasour*, 223 N.C. App. at 179, 741 S.E.2d at 326. Whereas in *Smith*, the defendant engaged officers in a "calm, civil discussion" inconsistent with "an intent to revoke the implied license to approach[,]" 246 N.C. App. at 179, 783 S.E.2d at 510, Defendant's conduct here underlined the

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3. When questioned about the late hour at oral argument, the State noted that the survivor of a car accident might knock on a homeowner's front door at any time to seek help. This is undoubtedly so. But, instead of bolstering the State's argument, it underlines its fundamental weakness.

The test here turns on social norms in routine circumstances—again, how a Girl Scout, trick-or-treater, or "reasonably respectful citizen unfamiliar with the house" would behave—not how someone responds to a potentially life-threatening emergency. *Jardines*, 569 U.S. at 8 n.2, 133 S. Ct. at 1415 n.2; *see, e.g.*, *Frederick*, 500 Mich. at 240, 895 N.W.2d at 547 ("[T]he fact that a visitor may approach a home in an emergency does not mean that a visitor who is *not* in an emergency may approach. Emergencies justify conduct that would otherwise be unacceptable; they are exceptions to the rule, not the rule."). Like those individuals, and unlike the survivor of a car accident, law enforcement has control over when it conducts a knock and talk. It stands to reason these officers generally performed knock-and-talks during the day because late-night efforts are more likely to cause alarm—a consideration in whether someone has an implicit license to approach a person's front door. *See Jardines*, 569 U.S. at 8 n.2, 133 S. Ct. at 1415 n.2; *see also id.* at 20, 133 S. Ct. at 1422 (Alito, J., dissenting). Returning to the State's car accident example, one need not look far into North Carolina's past to find such a late-night knock on a front door stemming from those exigent circumstances leading a homeowner to "call the police[,]" *id.* at 9, 133 S. Ct. at 1416, with tragic consequences, *see* Michael Gordon, *Jonathan Ferrell was just starting his life in Charlotte*, The Charlotte Observer (19 July 2015), https://www.charlotteobserver.com/news/local/crime/article27558442.html.

intent demonstrated by his no trespassing sign. Namely, he questioned the officers' presence on his property and was so "belligerent" in so doing that he was handcuffed. Though Defendant did not have a fence surrounding his property, *Smith* emphasized that it is not the presence of a gate or fence that indicates that a person's property is off-limits to the public, it is the *consistent* presence of a sign or the *consistent* locking of a gate that evinces this intent.[4] Here, Defendant's own conduct plus the lack of any findings or evidence that Defendant did not consistently display a no trespassing sign demonstrated, at the very least, that his yard was not open to the public.

While there may be circumstances where cutting across a person's yard does not exceed the scope of the implied license, *see State v. Grice*, 367 N.C. 753, 754, 767 S.E.2d 312, 314 (2015) (entering curtilage to approach defendant's side door appropriate where front door obscured and inaccessible),[5] and while knocking on Defendant's door at 9:30 p.m. is arguably, as the State contends, just "ambitious" as opposed to plainly beyond the pale, *see Hargett*, 2017 N.C. App. LEXIS 70, at *6-7, and while the presence of a no trespassing sign, by itself, might not expressly revoke the implied license, *see Smith*, 246 N.C. App. at 178, 783 S.E.2d at 510, the "reasonably respectful citizen" would have taken each of these facts into account in determining whether "background social norms" licensed him or her to quickly emerge from trees in a stranger's yard at night with two of his or her colleagues in order to illuminate, surround, and stop a moving car, *Jardines*, 569 U.S. at 8-9 n.2, 133 S. Ct. at 1415-16 n.2. Taken together, the officers' conduct went far beyond the "implied license" that "typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to

4. At oral argument, the State suggested the outcome might differ if the officers had seen the no trespassing sign, crossed over a moat filled with alligators, and scaled a fence that surrounded Defendant's property. The dissent similarly argues that Defendant did not revoke the implied license to approach his front door because, in part, he "did not have a fence surrounding his property[.]" *Falls*, *infra* at 259 (Berger, J., dissenting). We need only note in response that the protections of the Fourth Amendment extend to us all regardless of our ability to invest in physical barriers and reptiles. *See United States v. Ross*, 456 U.S. 798, 822, 102 S. Ct. 2157, 2171, 72 L. Ed. 2d 572, 592 (1982) ("[T]he most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion[.]").

5. Defendant notes both that "[t]he continuing validity of *Grice*'s ultimate holding is questionable following the United States Supreme Court's later decision in *Collins*[,]" and that it is not necessary for us to weigh in on this issue because of the distinguishing features of the current controversy. We agree on both counts.

be received, and then (absent invitation to linger longer) leave." *Id.* at 8, 133 S. Ct. at 1415.[6]

The officers here strayed beyond the bounds of a knock and talk; therefore, the seizure of evidence based on their trespassory invasion cannot be justified under the plain view doctrine. *Collins*, ___ U.S. at ___, 138 S. Ct. at 1672 ("[A]n officer must have a lawful right of access to any contraband he discovers in plain view in order to seize it without a warrant[.]"). Officers Padgett, Belton, and Hoyle did not have a right to be where they were when they saw the revolver and when they smelled marijuana in Defendant's car. Thus, the trial court erred in denying Defendant's motion to suppress.

IV. Conclusion

We "are not required to exhibit a naivete from which ordinary citizens are free." *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977). It takes no fine-grained legal knowledge to appreciate that a Girl Scout troop, a trio of teenage pranksters down the block, or perhaps more sinister characters are not impliedly licensed to emerge from trees that they were using for cover and concealment and cut across a person's yard, swiftly passing a no trespassing sign, to illuminate, surround, and stop that person's departing car on a dark, mid-December evening. It only requires common sense.

Because law enforcement can do no more than a private citizen in this context, the conduct in question implicated the Fourth Amendment. And because the officers lacked a warrant supported by probable cause

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6. The dissent primarily relies on pre-*Jardines* and/or pre-*Collins*, non-binding case law in arguing that this was a knock and talk instead of a search, most notably *United States v. Walker*, 799 F.3d 1361 (11th Cir. 2015). Of course, *Walker* is at most persuasive authority to this Court, *State v. Woods*, 136 N.C. App. 386, 390, 524 S.E.2d 363, 365 (2000) ("[W]ith the exception of the United States Supreme Court, federal appellate decisions are not binding upon either the appellate or trial courts of this State."), and, as with *Grice*, there are serious questions as to whether *Walker*'s holding survives *Collins*, ___ U.S. at ___, 138 S. Ct. at 1672 ("[S]earching a vehicle parked in the curtilage involves not only the invasion of the Fourth Amendment interest in the vehicle but also an invasion of the sanctity of the curtilage.").

Regardless of *Walker*'s dubious legal force, it is also factually distinguishable for several material reasons. First, law enforcement in *Walker* approached the defendant's "main door" via a gravel driveway leading to it—starting on the path the Girl Scouts would take. 799 F.3d at 1362. Law enforcement also did not take steps to conceal their appearance or approach from the defendant as they did in the present case. *Id.* Furthermore, there was no evidence that the defendant displayed a visible no trespassing sign on his property. *Id.* Finally, the defendant was sleeping inside of his stationary vehicle, which was turned off—not reversing out of his driveway—when approached by law enforcement. *Id.*

and no other exception to the Fourth Amendment's warrant requirement applied in this case, we conclude that the evidence in question was illegally obtained. Accordingly, we reverse the trial court's denial of the motion to suppress.

REVERSED.

Judge ZACHARY concurs.

Judge BERGER dissents by separate opinion.

BERGER, Judge, dissenting in separate opinion.

Because the officers did not exceed the scope of their implied license, I respectfully dissent.

Our review of a trial court's denial of a motion to suppress "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Reaves-Smith*, 271 N.C. App. 337, 340, 844 S.E.2d 19, 22 (2020) (citation and quotation marks omitted). "Unchallenged findings of fact, where no exceptions have been taken, are presumed to be supported by competent evidence and binding on appeal." *State v. McLeod*, 197 N.C. App. 707, 711, 682 S.E.2d 396, 398 (2009) (*purgandum*).

On appeal, Defendant contends that the trial court erred when it denied his motion to suppress because the officers (1) exceeded the scope of their implied license to conduct a knock and talk by cutting across "approximately 10-20 feet" of his front yard to approach his vehicle; and (2) were not lawfully present when they observed the contraband in plain view in his vehicle. In support of this argument, Defendant specifically challenges findings of fact 10 and 14, which state:

> 10. The house could be approached by walking up the driveway, which was obvious, or through the yard, which was not obvious.
>
> 14. The officers passed the front door of the house but did not go directly to the front door because there was no obvious path.

In addition, Defendant challenges conclusions of law 42, 43, and 47, which are set forth below:

> 42. Officer Belton also testified that himself, Padgett, and Hoyle passed the front of the front door by the house. However, there was no sidewalk or direct path to the door, so the officers continued to the driveway.
>
> 43. In walking along the right-of-way, the officers followed a path that a person visiting 2300 Davis Park Road would follow if that individual was going to knock on the front door of the house.
>
> 47. That the intrusion on the curtilage of the property was brief and minimal. Further, the officers did not use any special equipment or use any special force to enter the property. As a result, it was not an unreasonable intrusion and therefore did not violate the Fourth Amendment of the United States Constitution.

Although conclusions of law 42 and 43 are mixed findings of fact and conclusions of law, "we do not base our review of findings of fact and conclusions of law on the label in the order, but rather, on the substance of the finding or conclusion." *Reaves-Smith*, 271 N.C. App. at 343, 844 S.E.2d at 24 (citation and quotation marks omitted). We review these conclusions to determine whether they are supported by competent evidence. *Id.* at 340, 844 S.E.2d at 22.

Because Defendant challenges no other findings of fact, all remaining findings are presumed to be supported by competent evidence and are binding on appeal. *See McLeod*, 197 N.C. App. at 711, 682 S.E.2d at 398 ("Unchallenged findings of fact . . . are presumed to be supported by competent evidence and binding on appeal" (citation and quotation marks omitted)).

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. "The touchstone of the Fourth Amendment is reasonableness." *State v. Grice*, 367 N.C. 753, 756, 767 S.E.2d 312, 315 (2015) (citation and quotation marks omitted).

"Because an individual ordinarily possesses the highest expectation of privacy within the curtilage of his home, that area typically is afforded the most stringent Fourth Amendment protection." *State v. Smith*, 246 N.C. App. 170, 180, 783 S.E.2d 504, 511 (2016) (citation and quotation marks omitted). "[C]urtilage . . . is the area immediately surrounding and associated with the home. . . [and] law enforcement ordinarily cannot enter the curtilage of one's home without either a warrant or probable cause and the presence of exigent circumstances that justify the warrantless intrusion." *State v. Huddy*, 253 N.C. App. 148, 151, 799 S.E.2d 650, 654 (2017) (citation and quotation marks omitted).

"A knock and talk is a procedure by which police officers approach a residence and knock on the door to question the occupant, often in an attempt to gain consent to search when no probable cause exists to obtain a warrant." *State v. Stanley*, 259 N.C. App. 708, 714, 817 S.E.2d 107, 112 (2018) (citations and quotation marks omitted). Accordingly, "law enforcement [is not] absolutely prohibited from crossing the curtilage and approaching the home, based on our society's recognition that the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers, and peddlers[.]" *Grice*, 367 N.C. at 759-60, 767 S.E.2d at 318. "[W]hen officers enter private property for the purpose of a general inquiry or interview, their presence is proper and lawful[.]" *State v. Church*, 110 N.C. App. 569, 573-74, 430 S.E.2d 462, 465 (1993) (citation omitted).

Defendant argues that the officers exceeded their implied license by cutting across "approximately 10-20" feet of his front yard because such conduct would not have been reasonable for an uninvited guest. At the suppression hearing, Officer Belton testified that there was no path directly to the front door from the road and that to approach the front door you would have to "[e]ither come up behind the tree, or beside the tree, and go straight to it, or the path that we took to go down the driveway." Further, Officer Belton testified that the driveway was the only paved path to get to the front door. This testimony supports findings of fact 10, 14, and 43, namely that the officers had to walk past the front door to get to the driveway and that the obvious path to the house was down the driveway and through the sidewalk. Therefore, these findings are supported by competent evidence.

Defendant also challenges conclusion of law 43, which again, is a mixed finding of fact. However, at the hearing, Officer Belton testified that "[w]hen we arrived at the residence we walked pretty much where the road meets the property line . . . [t]here's no sidewalk, so we pretty much had to [walk] on the street but a little off on the road

. . . just because of vehicles coming by, and the fact that the night being dark[.]" This testimony supports that a reasonable person approaching the house would have to walk along the right of way to approach the driveway because there is no sidewalk. Therefore, this finding is supported by competent evidence.

Next, we must determine whether the trial court's findings of fact support conclusion of law 47 that officers cutting across "approximately 10-20 feet" of Defendant's yard was not an "unreasonable intrusion and therefore did not violate the Fourth Amendment of the United States Constitution."

Conduct that would be unreasonable for "solicitors, hawkers or peddlers . . . is also unreasonable for law enforcement officers." *Stanley*, 259 N.C. App. at 717, 817 S.E.2d at 113 (*purgandum*). "Law enforcement may not use a knock and talk as a pretext to search the home's curtilage [because] no one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search." *Huddy*, 253 N.C. App. at 152, 799 S.E.2d at 654 (*purgandum*). In fact, our courts have repeatedly held that an officer exceeds the scope of their implied license when they approach a home from the backyard, or snoop around the property to investigate the home. *See id.* at 149, 799 S.E.2d at 655 (finding that the officer exceeded the scope of implied license where officer ran a license plate on a car not visible from the street, checked windows for signs of a break-in, and walked around the entire residence to clear the sides of the home); *see also Stanley*, 259 N.C. App. at 717, 817 S.E.2d at 113 (determining that the officers exceeded the scope of implied license where they walked along a gravel driveway to the back door instead of using a paved walkway to the front door).

Here, after seeing a white male matching Defendant's description get into a vehicle, officers cut through "approximately 10-20 feet" of Defendant's front yard to approach the vehicle and to see if Defendant would speak with them – a valid purpose of a knock and talk. *See Church*, 110 N.C. App. at 573-74, 430 S.E.2d at 465 (finding that "when officers enter private property for the purpose of a general inquiry or interview, their presence is proper and lawful."); *see also United States v. Raines*, 243 F.3d 419, 421 (8th Cir. 2001) ("We have previously recognized that law enforcement officers must sometimes move away from the front door when attempting to contact the occupants of a residence."); *see also United States v. Taylor*, 458 F.3d 1201, 1205 (11th Cir. 2006) ("Such a minor departure from the front door [when officers proceeded to the curtilage of the defendant's property after defendant yelled 'Don't shoot my dog!'] does not remove the initial entry from the "knock and

talk" exception to the warrant requirement."). In fact, a driveway is an access route to the front door where officers are allowed to approach to conduct a "knock and talk." *Smith*, 246 N.C. App. at 181, 783 S.E.2d at 511. Accordingly, the officers did not exceed the scope of their implied license by cutting across "approximately 10-20 feet" of Defendant's front yard to approach the driveway.

Defendant also argues that the "No Trespassing" sign on a tree in his front yard expressly removed the officers' implied license to approach his home. However, a "No Trespassing" sign, alone, is not "sufficient to revoke the implied license to approach." *Id.* at 178, 783 S.E.2d at 510; *see*, *e.g.*, *United States v. Bearden*, 780 F.3d 887, 893-94 (8th Cir. 2015) (upholding "knock and talk" where officers entered property through an open driveway gate marked with "No Trespassing" signs). Rather, the homeowner must clearly demonstrate, through either a physical obstruction or verbal instructions, their intention to revoke the implied license. *See Smith*, 246 N.C. App. at 178, 783 S.E.2d at 510. Here, Defendant had only one "No Trespassing" sign, did not have a fence surrounding his property, and did not express his intention to revoke the implied license to approach until after the officers noticed the contraband in plain view. Therefore, Defendant did not effectively revoke the officers' implied license to approach.

Finally, Defendant contends under *Florida v. Jardines*, 569 U.S. 1 (2013) that the officers conducted an investigatory search when they approached his vehicle and exceeded the scope of their implied license by approaching his vehicle at 9:30 at night. However, *Jardines* is distinguishable. Here, the officers did not approach Defendant's car with the purpose of discovering incriminating evidence, nor did the officers approach with a forensic narcotics dog. *See Jardines*, 569 U.S. at 9-10 (holding that using a police dog to sniff for drugs on the front porch in hopes of discovering incriminating evidence exceeds the scope of the knock and talk exception). Rather, the officers approached Defendant's property with the intent to speak with him after receiving an anonymous tip, which led to a "knock and talk." *Id.* at 8 ("[A] police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.' " (citation omitted)).

This case is similar to *United States v. Walker*, 799 F.3d 1361 (11th Cir. 2015). In *Walker*, officers went to the defendant's residence at 5:04 a.m. to conduct a knock and talk to see if a man with an outstanding warrant was inside his house. *Id.* at 1362. Rather than first going to the front door, officers approached the defendant in his carport. The Eleventh Circuit held that the officers "small departure from the front door [to

go to the carport] when seeking to contact the occupants [was] permissible[,]" and that the officers did not conduct an investigatory search when they approached the vehicle because "the officers' behavior did not objectively reveal a purpose to search[.]" *Id.* at 1363-64. Further, the Eleventh Circuit held that going to someone's house before sunrise was not unreasonable because "although many people might normally be asleep at that early hour, the light on in the car indicated otherwise." *Id.* at 1364.

Here, as in *Walker*, the officers did not approach to conduct a search; rather, their main purpose was to follow up on the anonymous tip. Additionally, it was a small departure when the officers cut across "10-20" feet of Defendant's grass to then approach Defendant, who was outside of his house in a running car at 9:30 p.m. Thus, the officers' actions in approaching Defendant were permissible and not unreasonable under the Fourth Amendment.

Accordingly, the officers did not exceed the scope of their implied license, they were lawfully present when they arrived at Defendant's vehicle, and the subsequent searches were valid under the Fourth Amendment.

STATE OF NORTH CAROLINA
v.
MARC CHRISTIAN GETTLEMAN, SR. AND MARC CHRISTIAN GETTLEMAN, II AND DARLENE ROWENA GETTLEMAN

No. COA19-1143

Filed 15 December 2020

1. Appeal and Error—preservation of issues—criminal case—sufficiency of evidence—motion to dismiss specific charge or all charges—required

On appeal from multiple convictions, defendants failed to preserve for appellate review their arguments challenging the sufficiency of the State's evidence for charges of acting as an unlicensed bondsman or runner, where defendants neither moved to dismiss those specific the charges nor moved to dismiss all charges at trial. Although defendants moved to dismiss some of the other charges against them, a motion to dismiss some charges for insufficiency of the evidence does not preserve for appellate review arguments

regarding the sufficiency of the evidence of other charges for which no motion to dismiss was made and upon which the trial court had no opportunity to rule.

2. Appeal and Error—preservation of issues—admissibility of evidence—improper lay opinion—different objection raised at trial

In a prosecution for acting as an unlicensed bondsman or runner, defendant failed to preserve for appellate review his argument challenging the admission of two recorded 911 calls on grounds that they constituted improper lay opinion testimony under Evidence Rule 701 where, at trial, defendant did not raise this argument and instead objected to the evidence on different grounds. Further, defendant was not entitled to plain error review on the Rule 701 issue, which could only be reviewed on appeal for an abuse of discretion (and the plain error rule does not apply to matters falling within the trial court's discretion).

3. Sureties—definition of "surety"—accommodation bondsman—criminal prosecution—acting as unlicensed bondsman

In a prosecution for acting as unlicensed bondsmen and other charges, where defendants paid a professional bail bondsman to post two bonds for one of their employees and then, in a car chase, apprehended the employee for skipping bail by allegedly overturning his brother's truck (with the employee inside) and threatening him at gunpoint, defendants' argument that they acted lawfully as "sureties" or "accommodation bondsmen" was meritless. Because N.C.G.S. § 15A-531 defines a "surety" as a professional bondsman who executes a bail bond, defendants could not be sureties on the bonds they paid the professional bondsman (the true surety) to execute. Further, their failure to qualify as "sureties" meant that defendants could not qualify as "accommodation bondsmen" under N.C.G.S. § 58-71-1(1).

Appeal by defendants from judgments entered 3 June 2019 by Judge V. Bradford Long in Harnett County Superior Court. Heard in the Court of Appeals 22 September 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorneys General M. Denise Stanford and Daniel Snipes Johnson, and Assistant Attorney General Heather H. Freeman, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for defendant-appellant Marc Christian Gettleman, Sr.

Kellie Mannette for defendant-appellant Marc Christian Gettleman, II.

Anne Bleyman for defendant-appellant Darlene Rowena Gettleman.

ZACHARY, Judge.

Defendants[1] Marc Christian Gettleman, Sr., ("Big Marc"), Defendant Marc Christian Gettleman, II, ("Little Marc") and Darlene Rowena Gettleman ("Darlene") appeal from judgments entered upon a jury's verdicts finding them guilty of multiple offenses, all relating to an incident that occurred on 15 March 2018. After careful review, we conclude that Defendants received a fair trial, free from prejudicial error.

Background

In October 2017, Justin Emmons was placed on probation for two felony offenses and was ordered to find gainful employment as one of the conditions of his probation. Big Marc and Darlene hired Justin in November 2017 as a mechanic for their towing service and garage. While working for Big Marc and Darlene, Justin lived with their adult son, Little Marc.

In December 2017, Justin violated the terms of his probation by missing scheduled appointments and failing drug tests, and he was arrested. Big Marc and Darlene posted bond for Justin, using their business and home as collateral. Then, one day in mid-January 2018, Justin failed to show up to work. When Justin appeared that evening, Big Marc handcuffed him, and Defendants took him to the Harnett County Jail and surrendered him in order to have their property released from the bonds.

Darlene and Big Marc then paid Robert West, a professional bail bondsman, $1,500 to post one of two $15,000 bonds for Justin ("the January bonds"). Justin agreed to make payments to West on the balance owed to West for posting the second $15,000 bond. In addition, West required that Darlene and Big Marc execute an indemnity agreement, guaranteeing payment to West of any amounts that he should have to pay to the State in the event of the January bonds' forfeiture due to Justin's failure to appear.

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1. For ease of reading and clarity—and consistent with the parties' briefs, the record, and the transcripts of the proceedings below—we refer to Defendant Marc Christian Gettleman, Sr., as "Big Marc," Defendant Marc Christian Gettleman, II, as "Little Marc," and Defendant Darlene Rowena Gettleman as "Darlene."

On or about 11 March 2018, Justin left his job and his residence without informing Defendants. Darlene and Little Marc repeatedly attempted to phone Justin, but he did not respond to any of their calls or voicemails. Defendants kept West informed as they "called everybody [they] knew" in an attempt to locate Justin. Among the people who Defendants contacted was Justin's girlfriend, Nina. Little Marc told her that he would pay her $100 for information concerning Justin's whereabouts.

On the morning of 15 March 2018, Justin's brother Ryan picked him up in his Ford F150 truck and took him to a friend's garage to work on Ryan's classic Ford Mustang. Around midday, the brothers went to a nearby convenience store to buy some lunch. Nina told Little Marc that Justin would be at the convenience store, and Defendants went there to apprehend Justin. Big Marc notified West that they knew where Justin was, that they were going to pick him up, and that they would bring Justin with them to the jail.

Darlene drove Big Marc and Little Marc to the convenience store in her Ford Expedition SUV. When they arrived, Big Marc went inside to use the restroom. However, Justin was at the convenience store earlier than expected, and he saw Big Marc enter the store. Justin then told Ryan that he was leaving to avoid a confrontation with Defendants. Justin walked past Darlene and Little Marc as they sat in the Expedition, and Darlene told Little Marc "to get out, see if he [could] catch him." Little Marc followed Justin, who then "took off through the neighborhood." Little Marc kept pace with Justin for two or three blocks before he ran out of breath.

Darlene called Big Marc and told him that Justin had exited the convenience store and that Little Marc had followed him. Big Marc came out to the Expedition, and he and Darlene drove around searching for Justin. While he was running, Justin called Ryan and told him to pick him up. Big Marc and Darlene saw Justin jumping into Ryan's truck at the entrance to a neighborhood.

At trial, the parties gave varying testimonies of what happened next. Justin testified that Big Marc exited the Expedition, pointed a gun at him, and said, "[F]reeze or I'll shoot you," but that Justin kept running. Justin further testified that Darlene got out of the car and fired a gun, either at him or at the ground, as she chased him. Then Justin saw Ryan pull his truck around, and he flagged Ryan down and jumped in the truck.

In contrast, Big Marc testified that he did not point a gun at Justin, but rather that he merely yelled at him from the Expedition. He further testified that Darlene got out of the vehicle, carrying his gun, and said

that she would run after Justin. Big Marc got in the driver's seat of the Expedition and strayed into the bushes and birdbath of a yard as he turned the vehicle around, prompting the homeowners to scream and yell at him. Big Marc then heard what he thought may have been gunshots coming from the yard behind him. Big Marc saw Darlene chasing Justin, but he thought that Justin was too far ahead for Darlene to catch him, so he parked the Expedition across the center median and told her to get back in the vehicle.

Darlene's account is similar to Big Marc's. She testified that she exited the Expedition, unarmed, started running after Justin, and fell. Darlene gathered herself and returned to the Expedition. She explained that, with traffic approaching from both directions, they could not move from the center median.

Big Marc and Darlene both testified that they saw Ryan's truck, with Justin inside, lurching haltingly toward the passenger's side of the Expedition, as if Ryan was alternatively hitting the gas and then the brake. Big Marc got out of the Expedition, saw traffic backed up behind them, and told Darlene to exit the vehicle on the driver's side. As Darlene climbed over the console, she saw Ryan's truck "in the air." Big Marc testified that Darlene was "three-quarters of the way out" of the vehicle when Ryan's truck hit the Expedition and "just rolled."

The State's evidence differed markedly in this respect from Defendants'. Ryan testified that Big Marc drove the Expedition, against traffic, "directly at" them, so Ryan tried to merge into the middle lane to avoid a collision. He testified that Big Marc followed "into the middle lane with me, like PIT maneuvered the right side of my -- back of my truck, and it flipped over[.]"[2] Justin testified that Ryan "tried to veer out around [Big Marc and Darlene], and they just rammed his truck, just hit his truck, and ended up rolling us over."

Ryan's truck flipped over onto its roof. Justin and Ryan crawled out of the passenger's side window as Big Marc and Darlene approached the truck. Big Marc handcuffed Justin. Ryan and Big Marc began shouting at each other, before Ryan ran off.

Detective Joshua Teasley, of the Harnett County Sheriff's Office, testified that he received a call that there were "shots fired" and responded to the scene. He saw Ryan's overturned pickup truck, and traffic backed

2. "[A] 'Precision Intervention Technique ("PIT") maneuver . . . causes [a] fleeing vehicle to spin to a stop.' " *Scott v. Harris*, 550 U.S. 372, 375, 167 L. Ed. 2d 686, 691 (2007).

up in both directions. Darlene approached Detective Teasley, wearing a camouflage jacket and a badge around her neck. She told Detective Teasley, "[W]e have a $35,000 bond on [Justin] and he is trying to skip bond[,]" which led the detective to believe that Darlene "was a bondsman." Detective Teasley then walked around to the other side of the vehicle, where he saw Justin, handcuffed, with Big Marc holding the other cuff, and "began to try to figure out what was going on."

Justin and Darlene exchanged words in Detective Teasley's presence. Justin "seemed incredulous that she shot at him. He kept saying, you shot at me, you shot at me." Darlene replied that she did not shoot at him, but rather "at the ground." Detective Teasley called for EMS, because Justin said that he was in pain from the knee injury that he suffered when Ryan's truck rolled. Big Marc handed the cuffs to Darlene, who handcuffed herself to Justin and said, "[G]uess we're both going to Central Harnett Hospital." Justin got into the ambulance, and Darlene rode with him.

As more law enforcement officers responded to the scene, Little Marc approached the Expedition on foot, having heard the collision. At the direction of a state trooper, Little Marc moved the Expedition to the parking lot of a nearby fire station. Detective Teasley testified that "some of Justin's family arrived, and there was a pretty heated incident down at the fire station." Law enforcement officers responded to that scene as well, and they escorted Little Marc to his own vehicle, which was parked nearby. Big Marc testified that, as officers responded to the fire station scene, a highway patrolman told him to pick up Darlene at the hospital. Big Marc drove the Expedition to the hospital, arriving at approximately the same time as West. West took custody of Justin at the hospital, and when Justin was released, West took him to jail.

By the time Detective Teasley and other law enforcement officers had "finished talking with the parties involved" in the scene at the fire station, Detective Teasley noticed that "the ambulances [were] gone, [Defendants] were gone and their vehicle was gone." Detective Teasley testified that "the tenor of the investigation changed" hours later, when they "found out [Defendants] were not bondsmen[.]" Detective Teasley called Little Marc and requested that Defendants return to the scene.

Law enforcement officers interviewed each Defendant separately. Defendants admitted that they were not bondsmen, but both Darlene and Little Marc claimed that West told them to "do whatever [they] ha[d] to do" to apprehend Justin, short of crossing state lines or "us[ing] deadly force unless deadly force [wa]s used" against them.

On 29 May 2018, a grand jury returned indictments charging Big Marc with two counts of assault by pointing a gun, two counts of assault with a deadly weapon, and one count each of injury to personal property causing damage in excess of $200, acting as an unlicensed bondsman or runner, reckless driving, disorderly conduct, armed robbery, second-degree kidnapping, conspiracy to commit armed robbery, conspiracy to commit second-degree kidnapping, and felony hit and run resulting in injury. The grand jury also returned indictments charging Darlene with two counts of assault by pointing a gun, two counts of assault with a deadly weapon, and one count each of injury to personal property causing damage in excess of $200, acting as an unlicensed bondsman or runner, going armed to the terror of the people, disorderly conduct, failure to remain at the scene of an accident, armed robbery, second-degree kidnapping, conspiracy to commit armed robbery, and conspiracy to commit second-degree kidnapping. Finally, the grand jury returned an indictment charging Little Marc with conspiracy to commit armed robbery, conspiracy to commit second-degree kidnapping, acting as an unlicensed bondsman or runner, and disorderly conduct.

On 20 May 2019, Defendants' cases came on for a joint jury trial in Harnett County Superior Court before the Honorable V. Bradford Long. On 23 May 2019, at the close of the State's evidence, Defendants' counsel made separate motions to dismiss some of the charges against Defendants: (1) the robbery and kidnapping charges, and each of the corresponding conspiracy charges; (2) the felony hit-and-run charge against Big Marc and the charge of failure to remain at the scene of an accident charge against Darlene; (3) the disorderly conduct charge against Little Marc; and (4) the charge of going armed to the terror of the people against Darlene. The trial court granted Defendants' motion to dismiss the conspiracy charges as to each Defendant, but denied the other motions. On 24 May 2019, the State voluntarily dismissed one count of assault with a deadly weapon against Darlene. At the close of all of the evidence, Defendants' counsel renewed the previously denied motions to dismiss, and the trial court again denied these motions.

On 28 May 2019, the jury returned its verdicts. The jury found Big Marc guilty of both counts of assault with a deadly weapon, as well as the counts of injury to personal property causing damage in excess of $200, acting as an unlicensed bondsman or runner, reckless driving, disorderly conduct, and second-degree kidnapping. The jury found Darlene guilty of acting as an unlicensed bondsman or runner, disorderly conduct, failure to remain at the scene of an accident, and second-degree kidnapping. Lastly, the jury found Little Marc guilty of acting as an

unlicensed bondsman or runner. The jury found Defendants not guilty of all remaining charges.

After consolidating Big Marc's and Darlene's offenses for sentencing, the trial court sentenced Big Marc to 25–42 months' imprisonment and Darlene to 18–34 months' imprisonment, both sentences to be served in the custody of the North Carolina Division of Adult Correction. The trial court sentenced Little Marc to 10 days in the custody of the Harnett County Sheriff. Defendants gave oral notices of appeal in open court.

Discussion

Defendants raise multiple issues on appeal. Both Darlene and Little Marc argue that the trial court erred in denying their motions to dismiss the charges of acting as an unlicensed bondsman or runner. Little Marc also argues that the trial court committed plain error due to a variance between the indictment and the jury instructions with respect to the charge of acting as an unlicensed bondsman or runner. Big Marc argues that the trial court erred in admitting into evidence, over his objection, a recording of a 911 call, in which the caller gave what Big Marc claims was inadmissible lay-opinion evidence.

Defendants' remaining arguments turn on the same question of statutory interpretation: whether Defendants acted as sureties or accommodation bondsmen under N.C. Gen. Stat. § 58-71-1 (2019). First, Defendants essentially argue that the trial court committed plain error in failing to instruct the jury that they could have considered their actions to be the lawful acts of either sureties or accommodation bondsmen.[3] For the same reason, Little Marc also argues that the indictment against him "fails to allege a crime and is fatally defective." Finally, Darlene argues that the trial court erred in denying her motions to dismiss the second-degree kidnapping charge where, *inter alia*, there existed insufficient evidence of an unlawful confinement because she "had the legal authority [as a surety] to restrain Justin."

I. *Motions to Dismiss*

[1] Both Darlene and Little Marc argue that the trial court erred in denying their motions to dismiss the charges of acting as an unlicensed

3. To wit: Big Marc argues that "when viewed in the light most favorable to [him], the evidence from trial is sufficient to support a surety defense." Darlene argues that "it was prejudicial error for the jury not to be instructed [she] did not need to be licensed as a bondsman." Little Marc argues that "the jury was instructed they could find Little Marc guilty for actions constituting no offense." The success of each of these arguments hinges on whether Defendants qualified as either sureties or accommodation bondsmen under N.C. Gen. Stat. § 58-71-1.

bondsman or runner. However, upon careful review of the transcript, we conclude that Darlene and Little Marc failed to move to dismiss these charges, and therefore arguments related to the sufficiency of the evidence on these charges were not preserved for appellate review.

At the close of the State's evidence, defense counsel[4] did not make one, single motion to dismiss all the charges, but rather made a series of targeted "motions to dismiss *some* of" the charges. (Emphasis added). After defense counsel moved to dismiss the armed robbery and kidnapping charges, as well as the corresponding conspiracy charges, the trial court asked: "Were there other charges you wanted to be heard on?" Counsel indicated that there were, and the trial court responded: "Well, let's do it piecemeal, then. What else do you want to be heard about[?]" Defense counsel then moved to dismiss the felony hit-and-run charge against Big Marc and Darlene's charge for failure to remain at the scene of an accident.[5] The trial court granted Defendants' motions to dismiss the conspiracy charges, but denied "[a]ll other motions to dismiss at the close of the [S]tate's evidence[.]"

The following exchange then occurred:

> [DEFENDANTS' COUNSEL]: And I had more charges that I was going to –
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> THE COURT: I beg your pardon. You're messing with me, man. I thought you were finished. You keep sitting down. Go ahead.
>
> [DEFENDANTS' COUNSEL]: And do you want me to do all of mine?
>
> THE COURT: Let's just – yeah, let's go through them.
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> [DEFENDANTS' COUNSEL]: Okay. As to the –
>
> THE COURT: Let the record reflect that the court announcing that all motions were denied was based on

4. Although Defendants have separate appellate counsel, they shared the same trial counsel.

5. Defense counsel framed this motion as one to dismiss "both of the hit-and-run offenses as well as the charge against [Darlene] for failing to remain at the scene of an accident[.]" However, there was only one hit-and-run charge. The trial court interpreted this as a motion to dismiss the felony hit-and-run charge against Big Marc and the charge of failure to remain at the scene of an accident against Darlene. Insofar as the charges of acting as an unlicensed bondsman or runner are not implicated, our preservation analysis is not affected.

> the court's erroneous assumption [Defendants' counsel] had concluded his motion. The court now retracts that. The motion to dismiss as to the charge of armed robbery as to [Big Marc] and [Darlene] are denied. The motion to dismiss at the close of the [S]tate's evidence as to second-degree kidnapping lodged against [Big Marc] and [Darlene] are denied. The motion[ ] to dismiss [the charge against Darlene] for misdemeanor failure to remain at the scene of an accident as a passenger is denied. The motion to dismiss felony hit-and-run against [Big Marc] is denied.

Defense counsel then moved to dismiss Little Marc's charge for disorderly conduct, and Darlene's charge for going armed to the terror of the people. The trial court denied these motions as well.

At no point did defense counsel move to dismiss the charges of acting as an unlicensed bondsman or runner, or move to dismiss *all charges against Defendants*. Moreover, at the close of all of the evidence, defense counsel moved to "renew [the] motions to dismiss *that haven't previously been allowed*." (Emphasis added). Defense counsel did not make any new motions to dismiss either these now-challenged charges, or all of the charges, as permitted by our rules. *See* N.C.R. App. P. 10(a)(3) ("A defendant may make a motion to dismiss the action . . . at the conclusion of all the evidence, irrespective of whether defendant made an earlier such motion."); N.C. Gen. Stat. § 15A-1227(a)(2). In addition, the trial court did not consider or rule on the sufficiency of the evidence with regard to the charges of acting as an unlicensed bondsman or runner.

Our Supreme Court recently clarified that "under Rule 10(a)(3), a defendant's motion to dismiss preserves all issues related to sufficiency of the State's evidence for appellate review." *State v. Golder*, 374 N.C. 238, 246, 839 S.E.2d 782, 788 (2020). However, at issue in *Golder*, in which the defendant moved to dismiss both charges against him, was whether all arguments regarding the sufficiency of the evidence are preserved for appellate review with a properly timed motion to dismiss, even if defense counsel makes specific arguments regarding certain elements of a particular charge before the trial court. *See id.* at 242–43, 839 S.E.2d at 785–86. The *Golder* Court reviewed a line of cases in which this Court had developed a categorical approach to reviewing different types of motions to dismiss, and held that this Court's "jurisprudence, which ha[d] attempted to categorize motions to dismiss as general, specifically

general, or specific, and to assign different scopes of appellate review to each category, is inconsistent with Rule 10(a)(3)." *Id.* at 249, 839 S.E.2d at 790.[6]

Nevertheless, the *Golder* Court recognized the fundamental precept that "Rule 10(a)(3) requires a defendant *to make a motion to dismiss* in order to preserve an insufficiency of the evidence issue[.]" *Id.* at 245, 839 S.E.2d at 788 (emphasis added). This is especially relevant because where, as here, a defendant moves to dismiss some—but *pointedly not all*—of the charges against him or her, it follows that the targeted motions to dismiss certain charges cannot preserve issues concerning the sufficiency of the evidence regarding the charges that the defendant *deliberately chose not to move to dismiss*.

In this case, defense counsel did not specifically move to dismiss the charges of acting as an unlicensed bondsman or runner, nor generally move for dismissal of *all charges* against Defendants. And as the trial court's oral ruling—quoted above—makes plain, the court did not rule upon the sufficiency of the evidence of the charges of acting as an unlicensed bondsman or runner in considering the motions to dismiss advanced by defense counsel at trial.

Although pursuant to *Golder* a timely motion to dismiss preserves for appeal all issues regarding sufficiency of the evidence with respect to *that charge*, we do not conclude that our Supreme Court intended its holding to cover the circumstances presented by this case, where Defendants specifically and deliberately did not move to dismiss *all charges*.[7] Accordingly, we hold that a targeted motion to dismiss one

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6. The *Golder* Court summarized our Court's "three categories" of motions to dismiss as:

> (1) a 'general,' 'prophylactic' or 'global' motion, which preserves all sufficiency of the evidence issues for appeal; (2) a general motion, which preserves all sufficiency of the evidence issues for appeal, even though a defendant makes a specific argument as to certain elements or charges; and (3) a specific motion, which narrows the scope of appellate review to only the charges and elements that are expressly challenged.

Id. (citation omitted).

7. Indeed, in its first substantive opinion interpreting *Golder*, our Supreme Court described a defendant's motion to dismiss the only charge against him as "a general motion to dismiss[.]" *State v. Smith*, 375 N.C. 224, 229, 846 S.E.2d 492, 494 (2020). This suggests that, although this Court's pre-*Golder* categorical analysis was "inconsistent with Rule 10(a)(3)," *Golder*, 374 N.C. at 249, 839 S.E.2d at 790, our Supreme Court nevertheless acknowledges that "a general motion to dismiss" remains distinguishable from more specific motions to dismiss.

charge for insufficiency of the evidence does not operate to preserve for appellate review arguments related to the sufficiency of the evidence of charges for which no motion to dismiss was made, and upon which the trial court has not had an opportunity to rule. We are unable to review issues upon which the trial court has not ruled.

Our Supreme Court's opinion in *Golder* also forecloses appellate review of Little Marc's argument that a fatal variance existed between the indictment and the jury instruction on the charge against him of acting as an unlicensed bondsman or runner. Although Little Marc cites several pre-*Golder* cases which have reviewed variances between an indictment and jury instructions for plain error, any fatal variance argument is, essentially, an argument regarding the sufficiency of the State's evidence. *Cf. State v. Locklear*, 259 N.C. App. 374, 382–84, 816 S.E.2d 197, 204–05 (2018) (finding plain error in jury-instruction variance based upon the sufficiency of the State's evidence at trial); *State v. Ross*, 249 N.C. App. 672, 676, 792 S.E.2d 155, 158 (2016) (same). Our Supreme Court made clear in *Golder* that "moving to dismiss at the proper time under Rule 10(a)(3) preserves *all* issues related to the sufficiency of the evidence for appellate review." *Golder*, 374 N.C. at 249, 839 S.E.2d at 790. As Little Marc's argument fundamentally presents an issue "related to the sufficiency of the evidence" that he did not "mov[e] to dismiss at the proper time", *id.*, he has waived appellate review of this issue.[8]

Darlene and Little Marc also petition this Court to suspend our rules of appellate procedure pursuant to N.C.R. App. P. 2, and to review these arguments despite the lack of preservation. Our appellate courts possess the "inherent authority to suspend the rules in order to prevent manifest injustice to a party[.]" *State v. Moore*, 335 N.C. 567, 612, 440 S.E.2d 797, 823 (citation and internal quotation marks omitted), *cert. denied*, 513 U.S. 898, 130 L. Ed. 2d 174 (1994). However, as discussed below, we are

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8. Assuming, *arguendo*, that Little Marc's argument regarding a jury-instruction variance is reviewable for plain error, he cannot show that the trial court plainly erred because the asserted error does not concern "an *essential element* of the crime charged." *State v. Lu*, ___ N.C. App. ___, ___, 836 S.E.2d 664, 667 (2019) (citation omitted). Little Marc argues that while the indictment charged him with "violat[ing] the statute by attempting to and taking Justin into custody, the jury was instructed they could find Little Marc guilty of violating the statute for a large number of actions." However, as Little Marc recognizes in his appellate brief, in our *Golder* opinion this Court held that the State was not required "to specify the exact manner in which [a defendant] allegedly violated [s]ection 58-71-40" in an indictment charging the offense of acting as an unlicensed bondsman or runner. *State v. Golder*, 257 N.C. App. 803, 809, 809 S.E.2d 502, 506 (2018), *aff'd as modified*, 374 N.C. 238, 839 S.E.2d 782 (2020). Accordingly, this argument does not concern "an *essential element* of the crime charged," *Lu*, ____ N.C. App. at ___, 836 S.E.2d at 667 (citation omitted), and the trial court did not err, much less plainly err.

unpersuaded by Defendants' arguments concerning the charges against them of acting as unlicensed bondsmen or runners. We thus find no "manifest injustice" to justify our invocation of Rule 2, and we decline to do so. Accordingly, we dismiss these issues as unpreserved.

II. *Admissibility of 911 Call*

[2] Big Marc contends that the trial court erred by admitting a recorded 911 call in which the caller repeatedly states that Big Marc hit Ryan's truck with his Expedition "on purpose." On appeal, Big Marc argues that the recording was inadmissible as speculative lay-opinion testimony under Rule 701 of the North Carolina Rules of Evidence. However, careful review of the transcript reveals that Big Marc did not present this argument to the trial court. Thus, this issue was not preserved for appellate review.

Our Rules of Appellate Procedure provide that

> [i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C.R. App. P. 10(a)(1).

Where a defendant objects to the admission of evidence before the trial court and states a specific ground as the basis for that objection, but raises a different ground as the basis for his argument on appeal, the issue is not preserved. *State v. Hueto*, 195 N.C. App. 67, 71, 671 S.E.2d 62, 65 (2009). In *Hueto*, the defendant "never stated to the trial court that he objected to" the challenged evidence on the relevancy grounds he raised on appeal. Id. Instead, "it appear[ed] from the context that [the d]efendant objected . . . on hearsay grounds" before the trial court. *Id.* This Court therefore concluded that the defendant's issue was not preserved, and dismissed the issue. *Id.*

Here, Big Marc's counsel objected when the State moved to admit the recordings of two 911 calls, "on hearsay grounds as well as confrontational grounds." After hearing arguments from the parties, the trial court overruled Big Marc's "objection on both hearsay grounds and confrontation grounds." The parties never made, nor did the trial court rule upon, any arguments concerning Rule 701 and lay opinion testimony with respect to either of the 911 calls.

Our appellate courts have "long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount" on appeal. *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (citation and internal quotation marks omitted). Accordingly, Big Marc may not present his new argument for appellate review.[9]

"In criminal cases, an issue that was not preserved by objection noted at trial . . . nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4).

On appeal, Big Marc invokes the plain error rule, but only with regard to the sufficiency and timeliness of his hearsay and Confrontation Clause objections at trial, not his failure to raise the argument that he now advances on appeal. Although Big Marc contends that the judicial action questioned—the admission into evidence of the recorded 911 call—amounted to plain error, he does not do so "specifically and distinctly" with respect to the argument he now makes to this Court. *Id.* Accordingly, we conclude Big Marc has not complied with Rule 10(a)(4).

Moreover, assuming, *arguendo*, that Big Marc had adhered to Rule 10(a)(4)'s procedural requirements, he would still not be entitled to plain error review. Under Rule 701, "whether a lay witness may testify as to an opinion is reviewed for abuse of discretion." *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001). Our Supreme Court "has not applied the plain error rule to issues which fall within the realm of the trial court's discretion[.]" *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001).

For all of these reasons, we will not apply plain error review to the trial court's ruling in this instance. *See id.* Accordingly, we dismiss as unpreserved Big Marc's argument concerning the admission of the challenged 911 call.

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9. In his appellate brief, Big Marc references the Confrontation Clause argument made at trial solely to support his argument that the newly asserted Rule 701 error was prejudicial to him. Indeed, in his reply brief, Big Marc explicitly disclaims any implication that he raises a confrontation argument on appeal: "The State also appears to believe Big Marc is challenging the admission of the 911 call on confrontation grounds. *Big Marc raises no such argument on appeal.* He does discuss the lack of an opportunity to cross-examine the unavailable caller—but only in explaining how the inability to question the caller prejudiced Big Marc at trial. But *Big Marc makes no freestanding claim regarding the admissibility of the 911 call under the Confrontation Clause.*" (Emphases added) (citations omitted).

III. *"Surety" or "Accommodation Bondsman"*

[3] As previously mentioned, Defendants present several issues that turn on the question of whether, under our General Statutes, they acted lawfully as sureties or accommodation bondsmen with respect to the January bonds. Big Marc and Darlene argue that the trial court erred in failing to instruct the jury on their "surety defense"—that is, that they acted lawfully as sureties or accommodation bondsmen. For similar reasons, Little Marc argues that the indictment against him "fail[ed] to allege a crime" and thus was "fatally defective." Darlene additionally argues that the trial court erred in denying her motion to dismiss the charge of second-degree kidnapping because she had the legal authority as a surety or accommodation bondsman to confine or restrain Justin.

A. *Standard of Review*

Issues of statutory interpretation present questions of law, which this Court reviews de novo. *State v. Dudley*, ___ N.C. App. ___, ___, 842 S.E.2d 163, 164 (2020).

> Our task in statutory interpretation is to determine the meaning that the legislature intended upon the statute's enactment. The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish.

Id. (citations and internal quotation marks omitted).

B. *Analysis*

The parties agree that our statutes provide that "[n]o person shall act in the capacity of a professional bondsman, surety bondsman, or runner or perform any of the functions, duties, or powers prescribed for professional bondsmen, surety bondsmen, or runners under this Article *unless that person is qualified and licensed*[.]" N.C. Gen. Stat. § 58-71-40(a) (emphasis added). Defendants do not argue that they were so qualified and licensed. Instead, they present arguments that they acted lawfully, either as sureties or accommodation bondsmen. We disagree.

Big Marc and Darlene maintain that they were sureties on Justin's bonds, and that therefore their actions were lawful. Both cite the definition for "surety" from Chapter 58, Article 71 of our General Statues, which governs bail bondsmen and runners: "[o]ne who, with the principal, is liable for the amount of the bail bond upon forfeiture of bail." *Id.* § 58-71-1(10). Notably, there is no licensing requirement for a surety

under Chapter 58, Article 71. This is distinct from a "surety bondsman", which is separately defined as

> [a]ny person who is licensed by the Commissioner [of Insurance] as a surety bondsman under [Chapter 58, Article 71], is appointed by an insurer by power of attorney to execute or countersign bail bonds for the insurer in connection with judicial proceedings, and who receives or is promised consideration for doing so.

Id. § 58-71-1(11).

As Big Marc and Darlene do not argue that they were licensed bondsmen, their arguments that their unlicensed actions were lawful rest on the proposition that they were sureties on the January bonds, pursuant to the definition of section 58-71-1(10). Their arguments rely on our holding that "[t]he common law, recognized in North Carolina for many years and codified by statute, *authorizes the surety on a bail bond*, or a bail bondsman acting as his agent, *to arrest and surrender the principal* if he fails to make a required court appearance." *State v. Mathis*, 126 N.C. App. 688, 691, 486 S.E.2d 475, 477 (1997) (emphasis added), *aff'd*, 349 N.C. 503, 509 S.E.2d 155 (1998)[10]; *see also* N.C. Gen. Stat. § 15A-540(b) ("After there has been a breach of the conditions of a bail bond, ... [a] surety may arrest the defendant for the purpose of returning the defendant to the sheriff."). "This statutory right of arrest granted the surety does not change—but simply codifies a part of—the common law powers of sureties that have always been recognized in our state." *Mathis*, 349 N.C. at 513, 509 S.E.2d at 161.[11]

However, our holding in *Mathis* is immaterial in the present context unless Big Marc and Darlene were, in fact, acting as sureties on the January bonds. They contend that they were. Big Marc argues that "[b]oth the State's evidence and [Defendants'] testimony show Big Marc and Darlene were 'on' Justin's bonds as sureties." He particularly highlights the State's argument that "the Gettlemans' purpose in restraining the movement of Justin Emmons was financial. That is, they feared a loss." Likewise, Darlene argues she "was a surety who was personally

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10. For "a brief overview of the history of the American system of bail," see *Mathis*, 349 N.C. at 508–11, 509 S.E.2d at 158–60.

11. We note here that the sureties in *Mathis* were "licensed bail bondsmen." *Mathis*, 126 N.C. App. at 690, 486 S.E.2d at 476. *Mathis*, and its discussion of the statutory and common-law authority of sureties to arrest their principals, is thus inapplicable to the case at bar for this simple reason, in addition to the other reasons we discuss herein.

liable for the amount of Justin's two bail bonds upon forfeiture of that bail." However, these arguments lack merit.

First, these arguments do not account for the definition of "surety" found in section 15A-531, which supersedes the definition of "surety" in section 58-71-1(10) in circumstances where they conflict. *See id.* § 58-71-195 ("[I]n the event of any conflict between the provisions of this Chapter and those of Chapter 15A of the General Statutes of North Carolina, the provisions of Chapter 15A shall control and continue in full force and effect."). In section 15A-531, "surety" is defined more narrowly, to mean:

> a. The insurance company, when a bail bond is executed by a bail agent on behalf of an insurance company.
>
> b. *The professional bondsman, when a bail bond is executed by a professional bondsman or by a runner on behalf of a professional bondsman.*
>
> c. The accommodation bondsman, when a bail bond is executed by an accommodation bondsman.

Id. § 15A-531(8) (emphasis added). As a matter of interpreting the plain language of our statutes, we can come to no other conclusion than this: because the January bonds were executed by West, a professional bondsman[12], he is the "surety" on the bonds as a matter of statutory law. *See id.* § 15A-531(8)(b). Defendants cannot be sureties on the January bonds, because those bonds were "executed by a professional bondsman" who was the true surety. *Id.*

Further review of our bail bond statutes also defeats Big Marc's and Darlene's arguments that they acted as sureties. While Big Marc and Darlene may have been personally liable in the event of the forfeiture of the January bonds, they would not have been personally liable *to the State*. *See id.* § 15A-531(4) (defining a "[b]ail bond" as "an undertaking by the defendant to appear in court as required upon penalty of forfeiting bail *to the State* in a stated amount[,]" which may include "an appearance bond secured by at least one solvent surety." (emphasis added)); *accord id.* § 58-71-1(2). The evidence at trial suggested that Big Marc and Darlene would have been personally liable in the event of forfeiture,

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12. A "professional bondsman" is "[a]ny person who is approved and licensed by the Commissioner and who pledges cash or approved securities with the Commissioner as security for bail bonds written in connection with a judicial proceeding and who receives or is promised money or other things of value in exchange for writing the bail bonds." *Id.* § 58-71-1(8).

but only to West—the *actual* surety on the January bonds—and only as indemnitors. Simply put, agreeing to indemnify a bondsman on a bail bond does not a surety make.

Finally, Darlene argues in the alternative that she "was an accommodation bondsman who did not charge Justin a fee or receive any consideration for her action *as a surety*[,]" tracking the definition of "accommodation bondsman" found in Chapter 58, Article 71. That Article defines an "accommodation bondsman" as:

> A person who shall not charge a fee or receive any consideration for action as surety and who endorses the bail bond after providing satisfactory evidences of ownership, value, and marketability of real or personal property to the extent necessary to reasonably satisfy the official taking bond that the real or personal property will in all respects be sufficient to assure that the full principal sum of the bond will be realized if there is a breach of the conditions of the bond.

Id. § 58-71-1(1).[13]

However, in that Darlene did not act as a surety, she cannot meet this definition of an accommodation bondsman as a matter of plain statutory interpretation. Additionally, although Darlene references section 15A-531(8)(c) in her reply brief in support of this argument, she fails to reckon with its plain language: that definition only applies "when a bail bond is executed by an accommodation bondsman." *Id.* § 15A-531(8)(c). Darlene argues neither that *she* executed the January bonds as a purported accommodation bondsman, nor that West—who *did* execute the January bonds—acted as an accommodation bondsman. Thus, we find this alternative argument similarly unpersuasive.

We conclude that Defendants did not act lawfully, either as sureties or as accommodation bondsmen. Accordingly, we overrule Defendants' issues brought on this basis.

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13. Little Marc also relies on this definition to support his argument that "[t]he criminal act of acting as an unlicensed bondsman/runner cannot be committed by conduct Article 71 specifically authorizes for individuals who are not licensed bondsmen." In challenging the indictment charging him with acting as an unlicensed bondsman or runner, Little Marc argues that, "because the authority to arrest is specifically vested in unlicensed individuals under Article 71, it cannot serve as a violation of the law against acting as an unlicensed bondsman/runner." For the reasons discussed herein, we disagree.

Conclusion

Each Defendant failed to preserve an argument now raised on appeal: (1) Darlene and Little Marc failed to preserve their challenges to the sufficiency of the evidence to support the charges of acting as an unlicensed bondsman or runner, and (2) Big Marc failed to preserve his challenge to the admission of the second 911 call. Defendants have waived appellate review of those issues, and we dismiss those portions of Defendants' appeals.

As regards Defendants' other arguments on appeal, we conclude that Defendants received a fair trial, free from prejudicial error.

NO ERROR.

Chief Judge McGEE and Judge ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
MOISES JEMINEZ, DEFENDANT

No. COA19-843

Filed 15 December 2020

1. Constitutional Law—effective assistance of counsel—immigration consequences of guilty plea—motion for appropriate relief—insufficient findings for appellate review

After defendant—an undocumented immigrant against whom deportation proceedings were initiated after he pleaded guilty to multiple drug-related charges—filed a motion for appropriate relief (MAR) alleging ineffective assistance of counsel where his attorney advised him that a guilty plea "may" result in adverse immigration consequences, the trial court's order denying defendant's MAR was vacated and remanded. The attorney's failure to advise defendant that the guilty plea would make him permanently inadmissible to the United States (8 U.S.C. § 1182(a)(2)(A)(i)(II)) constituted deficient performance; however, further factual findings were necessary to determine whether 8 U.S.C. § 1229b(b)(1) (cancellation of removal) was also available to defendant and whether the attorney's deficient advice prejudiced defendant—that is, whether defendant would have rejected the plea deal but for the attorney's error.

2. Criminal Law—trial court—noncompliance with appellate court's prior order—failure to address validity of plea agreement

In a criminal case where the trial court denied defendant's motion for appropriate relief—alleging ineffective assistance of counsel where defendant, an undocumented immigrant, faced deportation after pleading guilty to drug-related charges based on his attorney's advice—without an evidentiary hearing, and where the Court of Appeals subsequently entered an order vacating the trial court's ruling and remanding the case for an evidentiary hearing, the Court of Appeals vacated and remanded the trial court's second order denying defendant's motion because the trial court failed to review, pursuant to the Court of Appeals' order, whether defendant's plea was knowingly and voluntarily entered.

Appeal by Defendant from judgment entered 5 October 2010 by Judge Anderson D. Cromer and from order entered 15 March 2019 by Judge Angela B. Puckett in Stokes County Superior Court. Heard in the Court of Appeals 3 March 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for defendant-appellant.

MURPHY, Judge.

The trial court must make sufficient findings of fact and conclusions of law to permit appellate review of its ruling on a motion for appropriate relief. Here, we vacate in part and remand because the trial court did not make sufficient findings to allow review on appeal of Defendant's arguments underlying his motion for appropriate relief.

Further, trial courts must comply with orders from the appellate courts. Where a trial court fails to comply with our prior order, we remand for consideration of any unaddressed issue. Here, we remand for consideration of whether Defendant knowingly and voluntarily entered into a plea agreement because the trial court failed to address this issue as directed by our prior order.

BACKGROUND[1]

Defendant, Moises Jeminez, is a Mexican citizen who came to the United States without documentation in 1987 at the age of seven. Defendant remained in the United States undocumented for the following thirty years until 2017. Defendant has a daughter, born in 2008, who is a United States citizen. In 2010, police found cocaine, cash, and digital scales in Defendant's home and arrested him. Defendant was indicted for possession with intent to sell or deliver a controlled substance and felony maintaining a dwelling for keeping or selling controlled substances, and charged with possession of drug paraphernalia. Defendant pleaded guilty to these charges after consulting with his attorney, who told him the guilty plea "*may* result in adverse immigration consequences." Pursuant to the plea, Defendant's charge of possession with intent to sell or deliver a controlled substance was reduced to simple possession of cocaine, the charges were consolidated, and Defendant received a 4 to 5 month sentence suspended for 18 months of supervised probation.

In 2017, Defendant was arrested by immigration authorities and deportation proceedings were initiated against him. Defendant's immigration attorneys informed him, but for his guilty plea in 2010, he could have applied to have his deportation cancelled under 8 U.S.C. § 1229b; however, his conviction of a controlled substance related offense rendered him ineligible for cancellation of removal.[2] Additionally, for the same reasons, Defendant was informed he is permanently inadmissible to the United States.[3] Based on these facts and his attorney's prior advice regarding the immigration consequences of pleading guilty in 2010, Defendant filed a *Motion for Appropriate Relief and Request for Temporary Stay and Suspension of The Criminal Judgment* ("MAR")

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1. Although some information included in this background was not within the trial court's findings of fact, we include them for completeness of the discussion on appeal. *Infra* at 282. In no way do we express any view as to the truth of this information not appearing within the findings of fact below, and to the extent the trial court addresses this information on remand it may set out findings of fact contrary to the background discussed here. *Infra* at 290-93 (discussing the trial court's incomplete factual findings).

2. "The term 'removable' means—(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under [8 U.S.C. § 1182], or (B) in the case of an alien admitted to the United States, that the alien is deportable under [8 U.S.C. § 1227]." 8 U.S.C. § 1229a(e)(2) (2010). "Removal" is a synonym for deportation. *Mellouli v. Lynch*, 575 U.S. 798, __, 192 L. Ed. 2d 60, 64 (2015) ("This case requires us to decide how immigration judges should apply a deportation (removal) provision . . . .").

3. "The terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A) (2010).

alleging ineffective assistance of counsel under *Padilla v. Kentucky*, 559 U.S. 356, 176 L. Ed. 2d 284 (2010).

In his MAR, Defendant argued his guilty plea to, and subsequent conviction of, a controlled substance offense resulted in his mandatory detention under 8 U.S.C. § 1226(c)(1)(A), inability to take advantage of executive discretion for cancellation of removal under 8 U.S.C. § 1229b, and inadmissibility for the rest of his life under 8 U.S.C. § 1182(a)(2)(A)(i)(II).[4] Defendant contended the loss of the exception to deportation and later admissibility following a conviction for a controlled substance were definitive and clear, and his attorney should have informed him of the consequences of his guilty plea as it related to these exceptions.

Initially, in 2017, the trial court entered an order ("the 2017 Order") denying the MAR without an evidentiary hearing. Defendant then filed a *Petition for Writ of Certiorari*, arguing the trial court erred in denying his MAR without an evidentiary hearing.[5] We granted this petition, vacated the 2017 Order, and remanded, stating

> [t]he petition filed in this cause by [D]efendant on 20 October 2017 and designated 'Petition for Writ of Certiorari' is allowed for the purpose of entering the following order: It appears an evidentiary hearing is required to resolve the issues of whether [D]efendant was denied effective assistance of counsel and whether his plea was knowingly and voluntarily entered. S*ee Padilla v. Kentucky*, 559 U.S. 356, 176 L. Ed. 2d 284 (2010); *State v. Nkiam*, [243] N.C. App. [777], 778 S.E.2d 863 (2015), *discretionary review improvidently allowed*, 369 N.C. 61, 791 S.E.2d 457 (2016). Accordingly, the order filed 9 October 2017 by Judge Anderson D. Cromer denying

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4. In Defendant's MAR, he refers to these statutes using their Immigration and Nationality Act ("INA") citations. We note INA 236(c)(1)(A) corresponds with 8 U.S.C. § 1226(c)(1)(A), INA 212(a)(2) corresponds with 8 U.S.C. § 1182(a)(2), and INA 240A(b) corresponds with 8 U.S.C. § 1229b(b).

5. Although Defendant's *Petition for Writ of Certiorari* is not in our Record, it is included in the record on appeal for COA P17-778, in which we granted Defendant's *Petition for Writ of Certiorari*. Therefore, we take judicial notice of its content because it appears within the record of the interrelated proceeding, with the same parties, and is referred to by Defendant. *See Lineberger v. N.C. Dep't of Corr.*, 189 N.C. App. 1, 6, 657 S.E.2d 673, 677, *aff'd in part, review dism. in part*, 362 N.C. 675, 669 S.E.2d 320 (2008) (citing *West v. G. D. Reddick, Inc.*, 302 N.C. 201, 202, 274 S.E.2d 221, 223 (1981)) ("In addition to the record on appeal, appellate courts may take judicial notice of their own filings in an interrelated proceeding.").

> [D]efendant's motion for appropriate relief without a hearing is hereby vacated and the matter remanded for an evidentiary hearing pursuant to N.C.[G.S.] 15A-1420(c)(4) and entry of an order pursuant to N.C.[G.S.] 15A-1420(c)(7). A copy of this order shall be mailed to the senior resident superior court judge and district attorney of Judicial District 17B and to the Office of the Appellate Defender.

After conducting an evidentiary hearing in 2019, the trial court entered an order ("the 2019 Order"), as follows:

> [FINDINGS] OF FACT
>
> 1. On [3 June 2010] a search warrant was executed on [] Defendant's residence and [] Defendant was charged with Possession With Intent to Manufacture, Sell and Deliver a Schedule II Controlled Substance, Maintaining a Dwelling for the Keeping of Controlled Substances, and Possession of Drug Paraphernalia.
>
> 2. On [7 June 2010] Brandon West was appointed to represent [] Defendant.
>
> 3. [] Defendant is not a citizen of the United States of America and is an undocumented Defendant.
>
> 4. On [5 October 2010] [] Defendant pled guilty in Stokes County Superior Court to Possession of Cocaine, Maintaining a Dwelling for the Keeping of Controlled Substances and Possession of Drug Paraphernalia. The charges were consolidated and [] Defendant received a probationary sentence.
>
> 5. [] Defendant was advised by his attorney and by the Court that his plea to the felonies *may* result in his deportation from this country, his exclusion from this country or the denial of his naturalization under federal law.
>
> 6. [] Defendant's plea resulted in convictions that could be classified as "presumptively mandatory" deportation. [] [D]efendant did not understand and was not advised by Mr. West of this fact.
>
> 7. In 2017 [] Defendant was picked up and ultimately deported from the United States.

CONCLUSIONS OF LAW

1. Under *Padilla v. Kentucky*, 559 U.S. 356, 176 L. Ed. 2d 284, 130 S. Ct. 1473 (2010), giving incorrect advice regarding the immigration consequences of a guilty plea may constitute Ineffective Assistance of Counsel. The North Carolina Court of Appeals in *State v. Nkiam*, 243 N.C. App. 777 (2015) held that in cases where the deportation consequences of [a] defendant's plea were "truly clear" the trial counsel is required to "give correct advice" and not just to advise [a] defendant that his "pending criminal charges may carry a risk of adverse immigration consequences." Mr. West failed to do so. However, the Court must also examine whether there was actual prejudice to [] [D]efendant for Mr. West's failure to fully advise him.

2. The Court next considers the prejudice prong of [] [D]efendant's claim for IAC. The State argues that [] Defendant was not prejudiced because he was an undocumented [D]efendant and was subject to being deported at any time regardless of whether he was convicted of any crime in this case.

3. The question of prejudice in a case where the defendant is undocumented and already subject to deportation has not been directly addressed in North Carolina. However, many jurisdictions throughout the United States, both state and federal courts (including the 4th Circuit), have addressed the issue. There is an almost unanimous line of authority finding there is no showing of prejudice where, as in this case, the defendant was already subject to deportation. See [non-binding cases].

4. In this case, [] Defendant was here illegally without documentation. He was deported in 2017 nearly 7 years after his conviction. [] [D]efendant was subject to being deported regardless of his plea in this criminal case. [Defendant] did not show he was prejudiced by Mr. West's failure to tell him anything other than he *may* be deported if he pled guilty because he was already subject to deportation regardless of whether he was convicted in this case. [] Defendant could still have been subject to deportation even if he had been acquitted of the charges he pled guilty to. He was subject to deportation per se on account of his

> unlawful status. [] [D]efendant presented no evidence that in 2017 his fate would have been different had his defense counsel obtained a different disposition of his cases.
>
> Therefore, [] Defendant has failed to prove he was prejudiced as a result of his attorney's lack of correct advice. As a result [] [D]efendant's motion for appropriate relief on the basis of ineffective assistance of counsel fails.

No findings of fact or conclusions of law in the 2019 Order directly resolve "whether [Defendant's] plea was knowingly and voluntarily entered." Similarly, no findings of fact or conclusions of law address Defendant's claims regarding mandatory detention, cancellation of removal, and/or inadmissibility.

ANALYSIS

"When considering rulings on motions for appropriate relief, we review the trial court's order to determine 'whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.'" *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)). "'When a trial court's findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions are fully reviewable on appeal.'" *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (quoting *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998)).

A. Ineffective Assistance of Counsel

[1] In *Padilla v. Kentucky*, 559 U.S. 356, 176 L. Ed. 2d 284 (2010), the United States Supreme Court held *Strickland v. Washington*[6] applies to

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6. Under *Strickland v. Washington*,

> [a] convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

ineffective assistance of counsel ("IAC") for deportation and trial counsel must advise their clients "whether [a] plea carries a risk of deportation." 559 U.S. at 366, 374, 176 L. Ed. 2d at 294, 299.

> When the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Id. at 369, 176 L. Ed. 2d at 296. "It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so 'clearly satisfies the first prong of the *Strickland* analysis.'" *Id.* at 371, 176 L. Ed. 2d at 297, (quoting *Hill v. Lockhart*, 474 U.S. 52, 62, 88 L. Ed. 2d 203, 212, (1985) (White, J., concurring in judgment)). In terms of prejudice, the Court stated, "to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Id.* at 372, 176 L. Ed. 2d at 297 (Citing *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 486, 145 L.Ed.2d 985, 997, 1000-01 (2000)).

We addressed *Padilla* in *State v. Nkiam*, in which we observed "*Padilla* mandates that when the consequence of deportation is truly clear, it is not sufficient for the attorney to advise the client only that there is a risk of deportation." *State v. Nkiam*, 243 N.C. App. 777, 786, 778 S.E.2d 863, 869 (2015). When discussing prejudice, we stated

> [i]n the plea context, "[t]he . . . 'prejudice[]' requirement[] . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 59, 106 S. Ct. at 370, 88 L. Ed. 2d at 210. Thus, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* The Supreme Court in *Padilla* emphasized, that in applying *Hill*, "to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under

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Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). Deficiency is shown where the representation "fell below an objective standard of reasonableness." *Id.* at 687-88, 80 L. Ed. 2d at 693. Prejudice is shown when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 80 L. Ed. 2d at 698.

> the circumstances." 559 U.S. at 372, 130 S. Ct. at 1485, 176 L. Ed. 2d at 297.

Id. at 792, 778 S.E.2d at 872-73. We further observed

> [w]hile the United States Supreme Court in *Hill* stated that "[i]n many guilty plea cases . . . the determination whether the error 'prejudiced' the defendant . . . will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial," 474 U.S. at 59, 88 L. Ed. 2d at 210, 106 S. Ct. at 370, "[t]he Supreme Court has 'never required an affirmative demonstration of likely acquittal at such a trial as the *sine qua non* of prejudice.'" *Padilla II*, 381 S.W.3d at 328-29 (quoting *Orocio*, 645 F.3d at 643). We believe cases focusing on the likelihood of acquittal rather than considering the importance a defendant places on avoiding deportation ignore the primary focus of *Padilla*, which was in large part the recognition that the likelihood of deportation may often be a much more important circumstance for a defendant to consider than confinement in prison for any length of time. 559 U.S. at 365, 368, 176 L. Ed. 2d at 293, 295, 130 S. Ct. at 1481, 1483. Thus, the consequence of deportation may, in certain cases, weigh more heavily in a defendant's risk-benefit calculus on whether he should proceed to trial. *For this reason, . . . we hold that a defendant makes an adequate showing of prejudice by showing that rejection of the plea offer would have been a rational choice, even if not the best choice, when taking into account the importance the defendant places upon preserving his right to remain in this country.*

Id. at 795, 778 S.E.2d at 874 (emphasis added).

In *Lee v. United States*, 137 S. Ct. 1958, 198 L. Ed. 2d 476 (2017), the United States Supreme Court similarly interpreted prejudice in this context, holding

> [w]hen a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

Lee at 1965, 198 L. Ed. 2d at 484-485. The United States Supreme Court also analyzed this issue according to the standard in *Padilla* that required "a defendant '[to] convince the court that a decision to reject the plea bargain would have been rational under the circumstances.'" *Id.* at 1968, 198 L. Ed. 2d at 488 (citing *Padilla*, 559 U.S. at 372, 176 L. Ed. 2d at 297).

Applying the above binding decisions, we first analyze Defendant's allegations of deficient performance according to whether each immigration statute implicated was "truly clear," and thus required trial counsel to provide Defendant with correct legal advice regarding them. *See Padilla*, 559 U.S. at 369, 176 L. Ed. 2d at 296. If "truly clear," we then analyze prejudice according to whether Defendant has shown a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial[,]" which can be accomplished by "convinc[ing] the court that a decision to reject the plea bargain would have been rational under the circumstances." *Lee*, 137 S. Ct. at 1965, 1968, 198 L. Ed. 2d at 484-485, 488; *accord Nkiam*, 243 N.C. App. at 792, 795, 778 S.E.2d at 872-873, 874.

1. Deportability under 8 U.S.C. § 1227(a)(2)(B)(i)

The trial court found, although "Defendant's plea resulted in convictions that could be classified as 'presumptively mandatory' deportation[,]"[7] Defendant was not prejudiced because he was "subject to deportation per se" due to his illegal presence in the country. As a preliminary matter, we note Defendant's guilty plea to a drug related offense did not impact whether Defendant was "subject to deportation." We believe the trial court was under the impression Defendant's conviction of controlled substance related charges made him deportable under 8 U.S.C. § 1227(a)(2)(B)(i), which reads "[a]ny alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, [or] the United States, . . . relating to a controlled substance . . . is deportable." 8 U.S.C. § 1227(a)(2)(B)(i) (2010). Although the United States Supreme Court held this statute has clear deportation consequences in *Padilla*, this provision does not apply here because Defendant was never "admitted." *See Padilla*, 559 U.S. at 368-69, 176 L. Ed. 2d at 295; *See* 8 U.S.C. § 1101(a)(13)(A) (2010) ("The terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.").

7. We recognize this language comes from the analysis of 8 U.S.C. § 1227(a)(2)(B)(i) in *Padilla*. *Padilla*, 559 U.S. at 368-69, 176 L. Ed. 2d at 295 ("The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect.").

As a result, there could not have been deficient performance by Defendant's trial counsel in failing to advise Defendant of the consequences of 8 U.S.C. § 1227(a)(2)(B)(i). Similarly, Defendant could not be prejudiced by not being informed of a statute that does not apply to him. To the extent the trial court concluded Defendant could not show prejudice resulting from this statute, it was correct.[8]

2. Mandatory Detention under 8 U.S.C. § 1226(c)(1)(A)

In Defendant's MAR, he refers to mandatory detention under 8 U.S.C. § 1226(c)(1)(A), stating

> [d]ue to his conviction for a controlled substance offense, among other things, he is subject to mandatory detention[.] . . . Had Defendant been given specific and correct advice that the guilty plea was almost certainly going to result in his future deportation . . . Defendant may have not been as motivated in pleading guilty . . . .

8 U.S.C. § 1226(c)(1)(A) reads "[t]he Attorney General shall take into custody any alien who . . . is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title." 8 U.S.C. § 1226(c)(1)(A) (2010). 8 U.S.C. § 1182(a)(2) reads, in relevant part, "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), . . . is inadmissible." 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2010); *see* 21 U.S.C. § 802(6) (2010) ("The term 'controlled substance' means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter."); 21 U.S.C. § 812 (2010); 21 C.F.R. § 1308.12(b)(4) (2010) (cocaine is a schedule II controlled substance).

The trial court did not address mandatory detention or the related statute in its 2019 Order. However, on appeal Defendant makes no argument about mandatory detention under 8 U.S.C. § 1226(c)(1)(A). As a result, for the purposes of this appeal this argument is deemed

8. The trial court was also correct in concluding Defendant was already subject to deportation on the basis of being within the country without documentation. *See* 8 U.S.C. § 1182(a)(6)(A)(i) (2010) ("An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible."); 8 U.S.C. § 1227(a)(1)(A) (2010) ("Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable."). Since 8 U.S.C. § 1227(a)(2)(B)(i) did not make Defendant deportable, 8 U.S.C. § 1227(a)(1)(A) was the basis for Defendant's deportation.

abandoned and we do not address it. N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

3. Discretionary Cancellation of Removal under 8 U.S.C. § 1229b(b)(1)

In his MAR, Defendant argues

> [d]ue to his conviction for a controlled substance offense . . . , he is . . . not eligible for cancellation of removal, which is his most promising form of relief from removal. . . . As a result of the plea, Defendant faces almost certain deportation from the United States.

8 U.S.C. § 1229b(b)(1), which establishes cancellation of removal, reads

> [t]he Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—
>
> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
>
> (B) has been a person of good moral character during such period;
>
> (C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and
>
> (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. § 1229b(b)(1) (2010). This statute is "truly clear" in terms of its application to someone convicted of a controlled substance offense; according to 8 U.S.C. § 1229b(b)(1)(C), if a defendant is convicted of an offense under 8 U.S.C. § 1227(a)(2), then he is ineligible for cancellation of removal.[9] As described above, 8 U.S.C. § 1227(a)(2) includes convictions related to controlled substances, such as cocaine.

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9. The United States Supreme Court suggested this is a clear consequence in *Padilla*, stating "if a noncitizen has committed a removable offense . . . , his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes

In order for trial counsel to have been obligated to inform Defendant of the impact of his conviction on the availability of cancellation of removal under 8 U.S.C. § 1229b(b)(1), the statute must be potentially available to Defendant. However, we are unable to determine this on appeal. In the trial court's order, there were no findings of fact regarding how long Defendant had been physically present in the country, whether Defendant had otherwise been a person of good moral character during this time period, whether he has other convictions implicating 8 U.S.C. § 1229b(b)(1)(C), or whether his "removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence."[10] 8 U.S.C. § 1229b(b)(1)(D) (2010). In the absence of any of these findings, we cannot determine if the statute was available to Defendant.[11] Therefore, we must remand for the trial court to first make findings regarding the availability of cancellation of removal under 8 U.S.C. § 1229b(b)(1) to Defendant. *State v. Graham*, 841 S.E.2d 754, 771 (N.C. Ct. App. 2020) *temporary stay and discretionary review granted in part on separate issue*, 374 N.C. 428, 839 S.E.2d 352 (Mem), 375 N.C. 272, 845 S.E.2d 789 (Mem) (2020) ("A trial court must make sufficient findings of fact and conclusions of law [in its order on an MAR] to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law.").

Assuming 8 U.S.C. § 1229b(b)(1) is available to Defendant, the statute is "truly clear" about the impact of a controlled substance conviction on the availability of discretionary cancellation of removal and trial counsel was required under *Padilla* to inform Defendant of its impact on his status. The legal advice provided by trial counsel to Defendant informed him "that his plea to the felonies *may* result in his deportation from this country, his exclusion from this country or the denial of his naturalization under federal law." Assuming 8 U.S.C. § 1229b(b)(1) applied to Defendant, such advice would constitute deficient performance;

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of offenses. *See* 8 U.S.C. § 1229b. Subject to limited exceptions, this discretionary relief is not available for an offense related to trafficking in a controlled substance." 559 U.S. at 363-64, 176 L. Ed. 2d at 292. Although it only discussed trafficking, when read in conjunction with the language of the statute, it is "truly clear" "this discretionary relief is not available for an offense related to" controlled substances in general. *Id.*

10. Some discussion of Defendant's daughter occurred at the hearing and the trial court must evaluate this information considering the statutory requirements for cancellation of removal.

11. We note, because the invocation of this statute is within the authority of the United States Attorney General, the trial court cannot determine that Defendant has a meritorious claim under this statute—it simply must determine if it is available to Defendant.

correct advice on the clear impact of the statute would have informed Defendant that his guilty plea and convictions on charges related to cocaine would result in ineligibility for cancellation of removal.

Although we can conduct a limited analysis of deficiency relying on the findings of fact below, on appeal we are unable to determine prejudice. In order to determine if Defendant was prejudiced by trial counsel's failure to advise him of the impact of a guilty plea to a controlled substances charge on cancellation of removal under 8 U.S.C. § 1229b, the trial court must have made findings of fact and conclusions of law regarding whether Defendant "demonstrat[ed] a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Lee*, 137 S. Ct. at 1965, 1968, 198 L. Ed. 2d at 484-485, 488 (internal marks omitted); *accord Nkiam*, 243 N.C. App. at 792, 795, 778 S.E.2d at 872-873, 874. We note Defendant, in his affidavit in support of his MAR, claimed:

> I was not aware that the immigration consequences of my plea were so serious, permanent, and definite. If I was aware of the specific immigration consequences of the plea, I would have been less inclined to assist [a co-defendant] in getting her criminal charges dismissed, I would have attempted to negotiate a more immigration-friendly plea agreement, or I would have litigated this possession case, even if the risk involved potentially serving an active term of imprisonment in the North Carolina Department of Corrections.

The trial court must determine the credibility of this statement in its analysis under *Lee*.[12] *Lee*, 137 S. Ct. at 1965, 198 L. Ed.2d at 484-485. Here, the findings of fact made by the trial court do not allow us to review the prejudice inquiry because we do not have any indication as to the importance Defendant placed on remaining in the country. Therefore, we must remand for consideration of the importance Defendant placed on

12. *See State v. Howard*, 247 N.C. App. 193, 210, 783 S.E.2d 786, 798 (2016) ("[A recanting witness] should have been questioned about whether his recantation was truthful, or merely a product of [the] defendant's direction as to what to state. Accordingly, an evidentiary hearing was required in order to assess the truthfulness of [the recanting witness's] affidavit."); *State v. Brigman*, 178 N.C. App. 78, 94-95, 632 S.E.2d 498, 509 (2006) ("Based on the record before us, we cannot determine the veracity of [a recanting witness's] testimony. Nor can we discern whether there is reasonable possibility that a different result would have been reached at trial had [the witness's] testimony at trial been different or non-existent. Accordingly, we must remand the [MAR] based upon her alleged recantation to the trial court for an evidentiary hearing.").

remaining in the country, including, but not limited to, evaluation of the credibility of Defendant's affidavit alleging he would not have accepted the plea deal. *Graham*, 841 S.E.2d at 771.

4. Inadmissibility under 8 U.S.C. § 1182(a)(2)(A)(i)(II)

In his MAR, Defendant argues "the plea [to and conviction of a controlled substance offense] made Defendant inadmissible to the United States for life, absent a couple of unusual exceptions."

8 U.S.C. § 1182(a)(2)(A)(i)(II) reads,

> . . . any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—
>
> . . .
>
> (II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21),
>
> is inadmissible.

8 U.S.C. § 1182(a)(2)(A)(i)(II) (2010). As previously discussed, this statute applies to Defendant's convictions related to cocaine. *See* 21 U.S.C. § 802(6) (2010) ("The term 'controlled substance' means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter."); 21 U.S.C. § 812 (2010); 21 C.F.R. § 1308.12(b)(4) (2010) (cocaine is a schedule II controlled substance). The language of this statute is "truly clear" in establishing that an alien is permanently inadmissible if he has been convicted of a controlled substance offense.

Additionally, it is "truly clear" this statute had an impact on Defendant's future admissibility. Had Defendant not been removed for a conviction related to controlled substances, he would have been inadmissible for only 10 years. *See* 8 U.S.C. § 1182(a)(9)(B)(i)(II) (2010) ("Any alien (other than an alien lawfully admitted for permanent residence) who . . . has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States[] is inadmissible."). As a result, trial counsel had an obligation to inform Defendant, prior to his guilty plea to controlled substance charges, of the consequences of such a conviction on his future admissibility under 8 U.S.C. § 1182(a)(2)(A)(i)(II). By advising Defendant simply that his conviction

"*may* result in his deportation from this country, his exclusion from this country or the denial of his naturalization under federal law[,]" when the conviction clearly would result in Defendant's permanent exclusion from the country, absent some rare exceptions, trial counsel's advice was deficient under *Strickland* and *Padilla*.

However, like with cancellation of removal under 8 U.S.C. § 1229b(b)(1), we are unable to determine on appeal if Defendant was prejudiced by the failure to provide correct advice regarding future inadmissibility under 8 U.S.C. § 1182(a)(2)(A)(i)(II). In order to determine if Defendant was prejudiced by trial counsel's deficient advice, we must evaluate whether Defendant "demonstrat[ed] a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Lee*, 137 S. Ct. at 1965, 1968, 198 L. Ed. 2d at 484-485, 488 (internal marks omitted); *accord Nkiam*, 243 N.C. App. at 792, 795, 778 S.E.2d at 872-873, 874. For the same reasons as above, the findings of fact made by the trial court do not allow us to analyze prejudice. It is necessary to remand for consideration of the importance Defendant placed on remaining in the country, including evaluation of the credibility of Defendant's affidavit alleging he would not have accepted the plea deal, to determine prejudice resulting from the deficient advice provided regarding 8 U.S.C. § 1182(a)(2)(A)(i)(II) and 8 U.S.C. § 1229b(b)(1). *Graham*, 841 S.E.2d at 771.

B. Trial Court's Compliance with Our Prior Order

[2] The trial court erred in failing to review whether Defendant's plea was knowingly and voluntarily entered as directed by our 30 October 2017 order. Our order stated,

> [i]t appears an evidentiary hearing is required to resolve the *issues of whether* [D]efendant was denied effective assistance of counsel *and whether* his plea was knowingly and voluntarily entered. . . . Accordingly, the order filed 9 October 2017 . . . denying [D]efendant's motion for appropriate relief without a hearing is hereby vacated and the matter *remanded for an evidentiary hearing . . . and entry of an order pursuant to [N.C.G.S. §] 15A-1420(c)(7)*.

(Emphasis added). As ordered, there were two distinct issues—(1) the potential ineffective assistance of counsel and (2) whether Defendant's plea was knowingly and voluntarily entered—as we used the word "issues" and prior to each issue stated "whether." Additionally, the trial court recognized them as two distinct issues during the hearing on 14 March 2019.

Defendant's MAR supports such a reading as it lists these as two related, but separate grounds. Our prior order required the trial court to address the content of the MAR when it ordered the trial court to make "entry of an order pursuant to [N.C.G.S. §] 15A-1420(c)(7)." N.C.G.S. § 15A-1420(c)(7) states:

> The court must rule upon the motion [for appropriate relief] and enter its order accordingly. When the motion is based upon an asserted violation of the rights of the defendant under the Constitution or laws or treaties of the United States, the court must make and enter conclusions of law and a statement of the reasons for its determination to the extent required, when taken with other records and transcripts in the case, to indicate whether the defendant has had a full and fair hearing on the merits of the grounds so asserted.

N.C.G.S. § 15A-1420(c)(7) (2019). In addition to our phrasing, our reference to this statute in our prior order directed the trial court to address the merits of all grounds asserted in Defendant's MAR, including if Defendant's plea was knowingly and voluntarily entered.[13]

Despite our prior order instructing the trial court to have an evidentiary hearing and enter an order under N.C.G.S. § 15A-1420(c)(7), the trial court failed to address "whether [Defendant's] plea was knowingly and voluntarily entered" in the 2019 Order. Our Supreme Court has held

> courts, whose judgments and decrees are reviewed by an appellate court of errors, must be bound by and observe the judgments, decrees and orders of the latter court, within its jurisdiction. Otherwise the courts of error would be nugatory and a sheer mockery. There would be no judicial subordination, no correction of errors of inferior judicial tribunals, and every court would be a law unto itself.
>
> . . .
>
> [W]hen it comes to our attention that a lower court has failed to comply with the opinion of this Court, whether through insubordination, misinterpretation or inattention, this Court will, in the exercise of its supervisory jurisdiction, *ex mero motu* if necessary, enforce its opinion and mandate in accordance with the requirements of justice.

13. Although both our phrasing and reference to the statute are relevant here in determining if the trial court complied with our prior order, each of these failures would independently be sufficient to require remand.

Collins v. Simms, 257 N.C. 1, 8, 10, 125 S.E.2d 298, 303, 304-05 (1962). The trial court did not satisfy our earlier order and we remand the case with our prior instructions to address "whether [Defendant's] plea was knowingly and voluntarily entered."

CONCLUSION

Trial courts must make sufficient findings of fact and conclusions of law to permit appellate review of an order denying an MAR. When a trial court fails to do so, we must remand. Here, because there are no findings of fact or conclusions of law addressing Defendant's claimed loss of discretionary cancellation of removal and future admissibility, as argued in his MAR, we cannot review these issues on appeal and must remand for consideration.

Our orders to a trial court are binding. When a trial court has not fully complied with our prior order, we must act appropriately to ensure our mandate is enforced. In this case, the trial court's failure to address "whether [Defendant's] plea was knowingly and voluntarily entered" in contravention of our prior order requires us to remand for determination of said issue.

For the foregoing reasons, we vacate the trial court's order denying Defendant's MAR. We remand for entry of a new MAR order, and an evidentiary hearing if necessary, consistent with this opinion.

VACATED IN PART; REMANDED.

Judges BRYANT and STROUD concur.

STATE OF NORTH CAROLINA
v.
RUFUS DURAND LYNCH

No. COA20-201

Filed 15 December 2020

Attorneys—potential conflict of interest—defense counsel serving as city attorney—police witnesses employed by city—insufficient inquiry regarding conflict

In a criminal prosecution, the trial court failed to conduct a sufficient inquiry regarding a potential conflict of interest—defendant's counsel served as the Lincolnton city attorney and the State's witnesses were Lincolnton police officers—where the court failed to determine whether defense counsel's role as city attorney required him to advise or represent the police department and its officers. The trial court also impermissibly shifted the responsibility to inquire into the potential conflict to the defendant and improperly focused its own questions on immaterial facts. Because the trial court's inquiry was insufficient, the Court of Appeals could not determine whether there was an actual conflict of interest and the case was remanded for further proceedings.

Appeal by Defendant from judgment entered 22 August 2019 by Judge Steve R. Warren in Lincoln County Superior Court. Heard in the Court of Appeals 9 September 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Rana M. Badwan, for the State-Appellee.

Sharon L. Smith for Defendant-Appellant.

COLLINS, Judge.

Defendant Rufus Durand Lynch appeals from judgment entered upon jury verdicts of guilty of felony assault on a female and attaining habitual felon status. Defendant argues that the trial court failed to properly inquire into his trial counsel's conflict of interest and failed to properly inform Defendant of the consequences of the conflict of interest. We remand this case to the trial court for a hearing to determine whether there was a conflict of interest arising from trial counsel's representation of both Defendant and the City of Lincolnton and for further proceedings consistent with that determination.

I. Procedural History and Factual Background

Following an investigation by officers from the Lincolnton Police Department, Defendant was indicted on one count of felony assault on a female, one count of habitual misdemeanor assault,[1] and one count of attaining habitual felon status.[2] Defendant was subsequently arrested by an officer of the Lincolnton Police Department on 16 November 2018.

Defendant was tried in Lincoln County Superior Court beginning on 20 August 2019. Defendant was represented by attorney T.J. Wilson, who also served as the City Attorney for Lincolnton. Law enforcement officers Randy Carroll, Rick Hensley, and Devon Rushing of the Lincolnton Police Department testified against Defendant. Following the charge conference but before closing arguments, Wilson informed the trial court that Defendant was "expressing some dissatisfaction at this point with his legal representation." The trial court asked to hear from Defendant himself on the issue. Defendant stated, "I don't think I've been represented right for the situation right here." After conferring with counsel, the trial court asked Defendant to "be a little bit more specific." Defendant responded, "I just think I've been mistreated in the situation . . . . What I'm saying is he's the city attorney, right? . . . So I'm thinking, you know, he worked for them. I don't think nobody—I'm going to get a fair trial, is what I'm trying to say."

The trial court then asked Defendant, "Other than that generalized complaint, Mr. Lynch, can you help the Court understand the specifics? Has something specific happened, sir, that you would like the Court to address?" Defendant answered that there was not, and raised his ongoing health issues. Following Defendant's answer, the trial court stated only that it was "prepared to proceed with the case."

After the jury was dismissed to deliberate, the trial court returned to the issue "to give Mr. Wilson an opportunity to respond to Mr. Lynch's concerns in the case, especially with regard to the representation of the Lincolnton Police Department." Wilson informed the trial court that he was the city attorney but "had no communication or contact with the Police Department concerning this case." Wilson contended that he had represented Defendant to the best of his ability and believed there was no conflict of interest. Wilson told the trial court that "ten years ago

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1. The record is silent as to the disposition of this charge.

2. Defendant was also charged with assault inflicting serious bodily injury, but the State voluntarily dismissed this charge at the close of evidence and the charging document was omitted from the record on appeal.

. . . maybe longer" he had sought an oral opinion from the State Bar and understood the representation to be appropriate. Wilson further informed the trial court that he had represented Defendant in the past on various minor criminal matters and the possible conflict of interest had not been raised.

The trial court again addressed Defendant directly and asked how long he had "known that Mr. Wilson represents the Lincolnton Police Department." Defendant could not recall, but admitted that it had been more than one year, and he had not raised the issue previously. When the trial court asked if there had been "anything about this case that makes you believe that Mr. Wilson's representation of the City of Lincolnton has adversely impacted the representation of you in this case," Defendant again expressed concern that he could not receive a fair trial. The trial court asked Defendant if he had any questions he would like to pose to Wilson in open court or under oath; Defendant declined. Likewise, the State declined to question Wilson. Without making any findings of fact or conclusions of law or otherwise ruling on Defendant's objections, the trial court proceeded to hear the jury verdict.

The jury found Defendant guilty of felony assault on a female and attaining habitual felon status. The trial court sentenced Defendant to a term of imprisonment of 89 to 119 months. Defendant gave notice of appeal in open court.

II. Discussion

Defendant argues on appeal that the trial court failed to conduct an adequate inquiry into his trial counsel's conflict of interest and failed to properly advise Defendant of the consequences of the conflict of interest.

"A criminal defendant subject to imprisonment has a Sixth Amendment right to counsel." *State v. Mims*, 180 N.C. App. 403, 409, 637 S.E.2d 244, 247 (2006). The Sixth Amendment right to counsel applies to the states through the Fourteenth Amendment of the United States Constitution. *State v. James*, 111 N.C. App. 785, 789, 433 S.E.2d 755, 757 (1993). Sections 19 and 23 of the North Carolina Constitution also provide criminal defendants in North Carolina with a right to counsel. *James*, 111 N.C. App. at 789, 433 S.E.2d at 757. "The right to counsel includes a right to 'representation that is free from conflicts of interests.'" *Mims*, 180 N.C. App. at 409, 637 S.E.2d at 248 (quoting *Wood v. Georgia*, 450 U.S. 261, 271 (1981)).

When a defendant fails to object to a conflict of interest at trial, the defendant "must demonstrate that an actual conflict of interest adversely

affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980); *see also State v. Bruton*, 344 N.C. 381, 391, 474 S.E.2d 336, 343 (1996). However, when a trial court is made aware of a possible conflict of interest prior to the conclusion of a trial, "the trial court must 'take control of the situation.'" *James*, 111 N.C. App. at 791, 433 S.E.2d at 758 (citation omitted); *see also State v. Hardison*, 126 N.C. App. 52, 55-56, 483 S.E.2d 459, 461 (1997). Where the trial "court 'knows or reasonably should know' of 'a particular conflict,' that court must inquire 'into the propriety of multiple representation.'" *State v. Choudhry*, 365 N.C. 215, 220, 717 S.E.2d 348, 352 (2011) (quoting *Sullivan*, 446 U.S. at 346-47). The trial court may determine, in its discretion, whether a full-blown evidentiary proceeding is necessary or whether some other form of inquiry is sufficient. *Id.* at 223, 717 S.E.2d at 354. But the inquiry must be adequate "to determine whether there exists such a conflict of interest that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment." *Mims*, 180 N.C. App. at 409, 637 S.E.2d at 248 (quotation marks, alterations, and citations omitted). Failure to conduct an adequate inquiry constitutes reversible error. *James*, 111 N.C. App. at 791, 433 S.E.2d at 759.

A conflict of interest arises where "the representation of one client will be directly adverse to another client" or "the representation of one or more clients may be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer." N.C. R. Pro. Conduct 1.7(a) (2019). When a conflict of interest arises,

> [c]onfidential communications from either or both of a revealing nature which might otherwise prove to be quite helpful in the preparation of a case might be suppressed. Extensive cross-examination, particularly of an impeaching nature, may be held in check. Duties of loyalty and care might be compromised if the attorney tries to perform a balancing act between two adverse interests.

James, 111 N.C. App. at 790, 433 S.E.2d at 758. While a defendant may waive the Sixth Amendment right to conflict-free counsel in certain circumstances, *State v. Nations*, 319 N.C. 318, 326, 354 S.E.2d 510, 515 (1987), some conflicts are deemed to be so fundamental that they may not be waived, *see Wheat v. United States*, 486 U.S. 153, 160, 162-63 (1988) (noting that "courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them" and

recognizing the trial court's discretion to decline a defendant's proffered waiver of the right to conflict-free counsel where the trial court finds an actual conflict to be unwaivable).

Though not precedential authority for this Court, North Carolina State Bar ethics opinions "provide ethical guidance for attorneys and . . . establish . . . principle[s] of ethical conduct." 27 N.C. Admin. Code 1D.0101(j) (2019).[3] RPC 73 addresses a factual situation in which a town attorney ("Attorney B") occasionally advised members of the town police department. In its inquiry into whether members of Attorney B's firm could represent criminal defendants in cases in which members of the town police force would be prosecuting witnesses, the Ethics Committee opined, in relevant part:

> Under the facts presented, Attorney B advises the police department and, in effect, represents the policemen. If Attorney B undertakes to represent criminal defendants arrested by town police, he is, in effect, simultaneously representing clients with adverse interests. It is presumed that the conflict created by this simultaneous representation is so fundamental that it cannot be waived by consent of the clients. Further, this disqualification is extended . . . to the other members of the attorney's firm. Therefore, the attorney's associates may not represent criminal defendants who were arrested by members of the police force.
>
> If, however, [the attorney] represents a governing body but does not represent the police department in criminal matters, neither he nor his partners would be disqualified from representing criminal defendants in cases where police officers are prosecuting witnesses.

N.C. RPC 73 (13 April 1990).

We are guided by N.C. RPC 73 and the rationale underpinning it and hold that a conflict of interest that cannot be waived arises where law enforcement officers testify against a defendant and the defendant's appointed counsel also advises the officers' department or its members and, in effect, represents the officers who are prosecuting witnesses against the defendant.

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3. Formal ethics opinions adopted under the current Revised Rules of Professional Conduct are designated as "Formal Ethics Opinions," those adopted under the repealed Rules of Professional Conduct are designated as "RPCs." *Id.* Opinions adopted under former rules remain valid unless overruled. *Id.*

Here, Defendant's objections and Wilson's responses put the trial court on notice of a sufficiently particular possible conflict of interest such that the trial court was obligated to conduct an inquiry. Though the trial court did so, its inquiry was insufficient because it did not determine whether Wilson advised the Lincolnton Police Department and, in effect, represented the police officers who testified against Defendant. When questioned, Wilson admitted that he was the city attorney and indicated that he "had no communication or contact with the Police Department concerning this case." But the trial court failed to determine the extent to which Wilson's role as city attorney required him to advise or represent the Lincolnton Police Department or its individual officers.

Moreover, the trial court impermissibly shifted the responsibility to inquire into the possible conflict to Defendant. *See Choudhry*, 365 N.C. at 224, 717 S.E.2d at 354-55 (holding that an inquiry was insufficient where, inter alia, the trial court primarily questioned only the defendant himself regarding whether he had any concerns pertaining to his representation, whether he was satisfied with the representation, and whether he desired to retain his counsel). The trial court repeatedly asked Defendant whether he had specific concerns regarding his representation; Defendant consistently articulated his worry that he was not receiving a fair trial. The trial court then invited Defendant himself to question Wilson concerning the possible conflict in open court and offered to place Wilson under oath. While Defendant declined, it was apparent that he remained concerned that a conflict of interest was impeding his right to zealous representation.

Additionally, the trial court focused much of its own questioning on how long Defendant had known Wilson was the city attorney and when he had raised his concern, facts immaterial to determining whether an actual conflict of interest existed. *See James*, 111 N.C. App. at 791, 433 S.E.2d at 758 (noting that the trial court's obligation to investigate the conflict arises so long as "the possibility of conflict is raised before the conclusion of trial").

Where, as here, this Court determines that the trial court's inquiry was insufficient, the remedy is to remand to the trial court for a hearing to determine whether a conflict exists. *State v. Gray*, 225 N.C. App. 431, 438, 736 S.E.2d 837, 842 (2013); *James*, 111 N.C. App. at 791, 433 S.E.2d at 759. Accordingly, we remand to the trial court to make that determination.

Should the trial court determine that Wilson advised or represented the Lincolnton Police Department or its members at any time relevant

to this case, Wilson labored under a conflict of interest that could not be waived and Defendant is entitled to a new trial. Should the trial court determine that Wilson did not advise or represent the Lincolnton Police Department or its members at any time relevant to this case, no conflict of interest existed and the judgment entered upon Defendant's convictions shall be left undisturbed.

III. Conclusion

Because the trial court's inquiry was insufficient, the record lacks key details concerning whether Wilson advised the Lincolnton Police Department or its members and, in effect, represented the law enforcement officers who testified against Defendant. This Court therefore cannot determine whether there was an actual conflict of interest, and we remand this case for further proceedings consistent with this opinion.

REMANDED WITH INSTRUCTIONS.

Judges STROUD and MURPHY concur.

STATE OF NORTH CAROLINA
v.
CHRISTIAN CAPICE MOORE

No. COA20-16

Filed 15 December 2020

1. Search and Seizure—search warrant—supporting affidavit—bad faith presentation of false and misleading information to magistrate

In a felony possession of marijuana case where the investigating officer, in the affidavit supporting the issuance of a search warrant for a house located at 133 Harriet Lane in Pollocksville, stated that an individual (not the defendant) who lived at the Harriet Lane address was selling powder cocaine and that a confidential informant made controlled buys "from this location," but the officer's investigation notes and his testimony showed that he knew when applying for the warrant that the drug buys actually occurred a mile from the Harriet Lane address, the officer's statements were false, made in bad faith, and were stricken from the affidavit.

2. Search and Seizure—probable cause—search warrant—false statements stricken from supporting affidavit—sufficiency of remaining allegations

In a felony possession of marijuana case, where statements in the supporting affidavit for a search warrant for defendant's house—alleging that controlled drug buys had occurred there—were stricken because they were false and made in bad faith, the remaining allegations—that another suspect who lived at defendant's house came out of the house one night, sold drugs to a confidential informant (the affidavit did not allege a particular location), and then returned to the house—did not show a sufficient nexus linking the residence to illegal activity, and therefore did not support a determination that probable cause existed to search the residence. The trial court's order denying defendant's motion to suppress and the judgment entered upon defendant's guilty plea were reversed.

Judge TYSON dissenting.

Appeal by Defendant from judgment entered 29 July 2019 by Judge Paul M. Quinn in Jones County Superior Court. Heard in the Court of Appeals 11 August 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Melissa H. Taylor, for State-Appellee.

Benjamin J. Kull for Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from judgment entered upon his guilty plea to felony possession of marijuana. Defendant argues that the trial court erred by denying his motion to suppress, where (1) the officer applying for a warrant to search Defendant's residence acted in bad faith by presenting the magistrate with false and misleading information and (2) no probable cause existed to issue the search warrant. We reverse the trial court's order denying Defendant's motion to suppress and reverse the judgment entered upon Defendant's guilty plea.

I. Background

Investigator Timothy W. Corey of the Jones County Sheriff's Office applied for a warrant on the eve of 25 November 2014 to search the premises at 133 Harriett Lane in Pollocksville ("133 Harriett Ln."), and

any persons or vehicles located on that premises at the time of the search. The affidavit in support of the application included a "Statement of Probable Cause" in which Corey alleged the following:

> (1) This investigation is part of a continuing and ongoing narcotics investigation that involves the possibility of further undiscovered illegal narcotics and/or other narcotics paraphernalia or contraband in the aforementioned home located at 133 Harriet Ln. Pollocksville[.]
>
> (2) The source of information is coming from a [sic] ongoing investigation that leads investigators with the Jones County Sheriff's Office to introduce an informant that would gain the trust of the subjects living at the home and make controlled buys of illegal narcotics from this location.
>
> (3) On 10-09-2014, investigators met with an Informant, who stated that he was able to make buys from a subject by the name of "Matt", who lives at this location on Harriett Ln. And stated that he is known for dealing powder cocaine. I had the informant to set up [sic] a buy from this subject for a gram of cocaine. That day we were able to buy with no problem.
>
> (4) On 10-21-2014, investigators met with the informant to make a second buy from the same location, that time we were able to set up and watch the suspect known as "Matt" come out of the house and meet with the informant and return back to the home afterwards.
>
> (5) On 11-07-2014, investigators met with the informant to make a third buy from this location same as the last with no problems; subject known as "Matt" came from inside the home and made the deal then returned back inside the residence.
>
> (6) On 11-25-2014, investigators met with the informant to make a forth [sic] buy from this location. At that time the suspect "Matt", made it clear that he was re-upping (getting more drugs) and told the informant that he would be good for whatever he needed.
>
> (7) Based off of this information in this investigation, I am requesting this search warrant of this suspect's property for any and all narcotics and cash proceeds. Due to my

> training and experience, I have reason to believe that illegal narcotics, narcotic/drug paraphernalia, large amounts of US Currency, are being kept and sold from this location.
>
> (8) Based on all of the findings of my investigation, I am able to show that the suspect listed above is in direct violation of the NC controlled substances act. By keeping and selling illegal narcotics at the residence located at 133 Harriet Ln. Pollocksville.

Upon the information and allegations contained in the application and affidavit, a magistrate determined that sufficient probable cause existed and issued the search warrant. Corey and other officers executed the warrant the following morning. Given the items seized during the search, Defendant, who is not the suspect "Matt" referred to in the affidavit, was arrested and indicted for possession with intent to sell or distribute a Schedule VI controlled substance, and maintaining a dwelling house for using, keeping, or selling controlled substances.

On 11 May 2016, Defendant filed a motion to suppress the evidence seized as a result of the search. Defendant argued that the search warrant was not supported by probable cause and that the affidavit "contains unsubstantiated information from an informant, false or misleading statements, and no allegations tending to establish that controlled substances were present in the residence or the vehicles located there."

On 22 January 2019, Defendant filed a supplemental affidavit in support of his motion to suppress in which defense counsel averred, in relevant part, as follows:

> 7. The [search warrant] application is written in such a way as to lead a reader to conclude that the "buys" were made at the property of 133 Harriett Lane, Pollocksville. However, [I have] reviewed copies of Detective Corey's reports concerning October 9, October 21, and November 7, 2014 reports of controlled buys from a suspect known as "Matt" on those days. According to those reports, the October 9, 2014 buy occurred at the corner of Ten Mile Fork Road and Highway 17, over one mile from 133 Harriett Lane, Pollocksville. The October 21, 2014 buy occurred "down the road"; and the November 7, 2014 buy occurred on Killis Murphy Road, over one mile from the 133 Harriet Lane address.
>
> . . . .

> 9. Upon information and belief, [t]he statements by the affiant in his application for a search warrant that all the "buys" were made from the same location, which he previously referred to 133 Harriett Lane are misleading, and to the extent intended to portray that the buys were made from 133 Harriett Lane are false. As they were made by Detective Corey, the same detective involved in conducting the alleged controlled buys on the dates in question, these statements were knowingly made, and made with a reckless disregard for the truth.

Attached to the supplemental affidavit were copies of Corey's police reports concerning the alleged controlled buys from a suspect known as "Matt" on 9 October, 21 October, and 7 November 2014.

The trial court held a hearing on Defendant's motion to suppress on 23 January 2019. The trial court first considered the four corners of Corey's search warrant application and affidavit and heard arguments of counsel. No testimony or other evidence was presented.

At the close of the arguments, the court announced, "I'll do the order on this, but I'm going to indicate to you the findings of fact that I'll be including in that order[.]" The court found that "[i]n the application for the search warrant, [Corey] asserts there's probable cause to believe that 133 Harriet Lane, Pollocksville, North Carolina, a tan in color double-wide, with gray shingles are [sic] storing and selling narcotics" and "[a]gain alleg[es] that it's happening at 133 Harriet Lane in Pollocksville." The court then turned to the affidavit and considered the "eight, numbered paragraphs which purport to be the statement of probable cause for the issuance of the search warrant." After reciting the allegations in those paragraphs, and finding that the magistrate relied solely upon those factual allegations in issuing the warrant, the trial court found, in part:

> [I]t appears that based on the information and personal observation of the detective, that a buy was made at the 133 Harriet Lane address in Pollocksville on October 9, 2014. And, as I read it, it seems to me the plain language of this affidavit is that on October 9, 2014, a gram of cocaine was purchased at that location from a subject by the name of Matt.
>
> . . . .
>
> [T]he Court finds -- and this is the totality of the circumstances, and giving proper deference to the decision

> of the magistrate -- it appears there were two purchases made, and that would be a substantial basis for concluding there was probable cause to issue the search warrant.

The trial court then considered Defendant's supplemental affidavit and Corey's police reports, and heard arguments from the State and Defendant on the threshold inquiry required under *Franks v. Delaware*, 438 U.S. 154 (1978). Under this inquiry, a defendant must make "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit" and the allegedly false statement must be necessary to the probable cause determination. *Id*. at 155-56. Defendant argued that the drug buys did not occur at 133 Harriet Ln., that Corey was the lead investigator present for all of the buys and had knowledge of the actual locations of the buys, and that Corey's affidavit statements to the contrary were false and demonstrated a reckless disregard for the truth. Defendant further argued that when the false allegations were stricken from the affidavit, the search warrant application was not supported by probable cause. The State argued to the contrary. The trial court determined that Defendant met the threshold inquiry and allowed Defendant to put on evidence of Corey's allegedly false statements. Defendant introduced the police reports and called Corey as witness.

During direct examination, Corey admitted that none of the buys actually took place at 133 Harriet Ln. and affirmed that he knew that at the time he wrote his affidavit in support of the search warrant. Defendant inquired about Corey's affidavit and his description that the informant made "controlled buys of narcotics from this location." He asked Corey, "are you talking about the home and location of [133 Harriet Ln.]?" Corey replied, "I'm talking about the subjects residing in that home that's selling narcotics, sir." On cross examination, the State asked, "So you're not really -- when you say 'the same location,' you don't mean Ten Mile Road or whatever it is, and you don't mean 133 Harriet Lane. You mean from this guy ['Matt'], the same location that we're watching come out of the house, and go back in the house, that's how you're characterizing this?" Corey replied, "Exactly. Yes."

At the conclusion of the hearing, the trial court ruled as follows:

> I am going to deny the motion. Here's why, and I'll do the order. I gave my reason about the motion to suppress the first motion and said that in reading it, I felt that you should conclude that the location of the transactions was the Harriet Lane address. At this stage, I've got

> the benefit of what the magistrate got, plus the attachments to the supplemental affidavit, and more importantly the testimony of the officer. And then we reading that language [sic], as the DA sort of focused in on, those allegations in the warrant just say, "the location."
>
> The officer's testified, you know, he's talking about a seller coming from Harriet Lane, going to these specific places that he's disclosed to where the transactions actually took place. So, in looking at it with the benefit of that extra information, I don't believe there's been any showing that the statements were false, the statements in the affidavit. I don't believe they were false, so I don't have to reach anything else.
>
> I think when you read them in light of the officer – I read them so I wouldn't look at them and, after the fact, based just on the warrant, and concluded that we're talking about Harriet Lane. When you go back and read them, they don't actually say the buys took place at Harriet Lane. They really don't say that. They don't say where. They don't say Harriet Lane. They just say "the location." So there's nothing about that statement in light of the officer's explanation for what prompted him to submit that affidavit that would lead the Court to conclude that he either made a false statement or was somehow recklessly in disregard of the truth. It appears to me, on its face, it's true at this point.

On 24 January 2019, the trial court issued a written order denying Defendant's motion to suppress. The trial court left undisturbed its oral findings of fact and conclusions of law based on the evidentiary *Franks* hearing and did not reduce them to writing. The written order included findings of fact upon which the trial court concluded that "the application and affidavit of Detective Corey provided adequate support for the magistrate's finding of probable cause for the issuance of the search warrant in this case." The trial court denied Defendant's motion to suppress.

Defendant pled guilty to felony possession of marijuana; pursuant to the plea agreement, the State dismissed the remaining charge of maintaining a dwelling for using, keeping or selling controlled substances. The trial court sentenced Defendant to 8-19 months' imprisonment, suspended the sentence, and placed Defendant on 24 months' supervised probation. Defendant was ordered to pay $372.50 in court costs and

remain gainfully employed while on probation. Defendant gave proper notice of appeal in open court.

II. Discussion

Defendant argues that the trial court erred by denying Defendant's motion to suppress, where (1) the officer applying for a warrant to search Defendant's residence acted in bad faith by presenting the magistrate with false and misleading information and (2) no probable cause existed to issue the search warrant.

A. False and Misleading Information

[1] The standard of review in evaluating a trial court's rulings on a *Franks* hearing is the same as the standard of review in evaluating a trial court's ruling on a motion to suppress. *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997). Thus, our review is limited to whether the trial court's findings of fact are supported by competent evidence, and whether the findings of fact support the trial court's conclusions of law. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "Further, the trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *Fernandez*, 346 N.C. at 11, 484 S.E.2d at 357 (citation omitted).

Although the trial court held an evidentiary *Franks* hearing on the veracity of Corey's allegations in the affidavit, the trial court did not include in its written order denying Defendant's motion to suppress findings of fact or conclusions of law resulting from the hearing. However, as the trial court made oral findings of fact and conclusions of law based on the *Franks* hearing, we will review the trial court's oral findings to determine if they are supported by competent evidence and to determine if they support the trial court's conclusions of law. *See State v. Oates*, 366 N.C. 264, 268, 732 S.E.2d 571, 574 (2012) ("While a written determination is the best practice, nevertheless the statute does not require that these findings and conclusions be in writing.") (citation omitted).

It is well settled that a search warrant must be based on probable cause. *Fernandez*, 346 N.C. at 13, 484 S.E.2d at 358; *see* U.S. Const. amend. IV. "Probable cause for a search [warrant] is present where facts are stated which establish reasonable grounds to believe a search of the premises will reveal the items sought and that the items will aid in the apprehension or conviction of the offender." *Fernandez*, 346 N.C. at 13, 484 S.E.2d at 358 (citation omitted). An application for a search warrant must include (1) a statement of probable cause indicating that the items specified in the application will be found in the place described;

and (2) "one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched[.]" N.C. Gen. Stat. § 15A-244 (2019).

"It is elementary that the Fourth Amendment's requirement of a factual showing sufficient to constitute 'probable cause' anticipates a truthful showing of facts." *Fernandez*, 346 N.C. at 13, 484 S.E.2d at 358 (citing *Franks*, 438 U.S. at 164-65). "[T]ruthful" in this context means "that the information put forth is believed or appropriately accepted by the affiant as true." *Franks*, 438 U.S. at 165; *see also* N.C. Gen. Stat. § 15A-978(a) (2019) ("[T]ruthful testimony is testimony which reports in good faith the circumstances relied on to establish probable cause."). There is a presumption of validity with respect to the affidavit supporting the search warrant. *Franks*, 438 U.S. at 171.

"A defendant may contest the validity of a search warrant and the admissibility of evidence obtained thereunder by contesting the truthfulness of the testimony showing probable cause for its issuance." N.C. Gen. Stat. § 15A-978(a). "Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment, as incorporated in the Fourteenth Amendment, requires that a hearing be held at the defendant's request." *Franks*, 438 U.S. at 154.

Upon an evidentiary hearing, the only person whose veracity is at issue is the affiant himself. *Id.* at 171. "The defendant may contest the truthfulness of the testimony by cross-examination or by offering evidence." N.C. Gen. Stat. § 15A-978(a). "A claim under *Franks* is not established merely by evidence that contradicts assertions contained in the affidavit, or even that shows the affidavit contains false statements. Rather, the evidence must establish facts from which the finder of fact might conclude that the affiant alleged the facts in bad faith." *Fernandez*, 346 N.C. at 14, 484 S.E.2d at 358 (citation omitted). In the context of an omission, a violation occurs where an "affiant[] omit[s] material facts with the intent to make, or in reckless disregard of whether they thereby made, the affidavit misleading." *U.S. v. Colkley*, 899 F.2d 297, 300 (4th Cir. 1990) (internal quotation marks and citation omitted).

If a defendant establishes by a preponderance of the evidence that a "false statement knowingly and intentionally, or with reckless disregard for the truth" was made by an affiant in an affidavit in order to obtain a

search warrant, that false information must be then set aside. *Franks*, 438 U.S. at 155-56. If "the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Id.* at 156.

In this case, Corey's affidavit in support of the application for a warrant to search 133 Harriet Ln. stated that there was an investigation involving the possibility of drugs and paraphernalia in the "home *located at 133 Harriet Ln.*" (Emphasis added). Investigators "introduce[d] an informant that would gain the trust of the subjects living at the home and *make controlled buys of illegal narcotics from this location.*" (Emphasis added). The affidavit further stated:

> (3) On 10-09-2014, investigators met with an Informant, who stated that he was able to make buys from a subject by the name of "Matt", who lives *at this location on Harriett Ln.* And stated that he is known for dealing powder cocaine. I had the informant to set up a buy [sic] from this subject for a gram of cocaine. That day we were able to buy with no problem.
>
> (4) On 10-21-2014, investigators met with the informant to make a second buy *from the same location*, that time we were able to set up and watch the suspect known as "Matt" come out of the house and meet with the informant and return back to the home afterwards.
>
> (5) On 11-07-2014, investigators met with the informant to make a third buy *from this location same as the last* with no problems; subject known as "Matt" came from inside the home and made the deal then returned back inside the residence.
>
> (6) On 11-25-2014, investigators met with the informant to make a forth [sic] buy *from this location.* At that time the suspect "Matt", made it clear that he was re-upping (getting more drugs) and told the informant that he would be good for whatever he needed.
>
> (7) Based off of this information in this investigation, I am requesting this search warrant of this suspect's property for any and all narcotics and cash proceeds. Due to my training and experience, I have reason to believe

> that illegal narcotics, narcotic/drug paraphernalia, large amounts of US Currency, are being kept and sold *from this location*.

(Emphasis added).

Defendant moved to suppress the evidence seized from 133 Harriet Ln. on the grounds that the affidavit contained false and misleading information because none of the alleged controlled drug buys and meetings took place at 133 Harriet Ln. Attached to the supplemental affidavit supporting the motion to suppress were Corey's police reports concerning the alleged controlled buys from "Matt" on 9 October, 21 October, and 7 November 2014.

Corey's police report documenting the 9 October events states, in relevant part:

> I had the informant make a call to the suspect to set up a buy of cocaine. The suspect told the informant to meet with him at the corner of tem [sic] mile fork and hwy 17, stated that he didn't need anyone at the house right now.
>
> . . . .
>
> I . . . sent him to the meeting location to make the buy of cocaine from the suspect.
>
> Deputy Taylor and I then set up where we were able to see the suspects home Just as we got in place we saw the suspect come out of the house . . . and get in a small black four door car. We fallowed [sic] the suspect down to where our informant was weighting [sic] at the meeting location.
>
> As the suspect pulled in to meet with our informant we went down the road and parked where we had sight of the meeting location after the deal was complete we fallowed [sic] the suspect back to Harriett ln. . . .

Corey's police report documenting the 21 October events states, in relevant part:

> I had the informant make a call to the suspect to set up a buy of cocaine. The suspect told the informant to meet with him at the same spot as last time (tem [sic] mile fork and hwy 17).

. . . .

> Capt. Bateman and I then set up where we were able to see the suspects home. I received a call from the informant telling me that the suspect had called him and changed the meeting location. The informant stated that now he wanted him to pick up him up [sic] at the end of Harriett Ln. . . .
>
> We saw the suspect come out of the house, dressed in a dark shirt and pajama pants then got in the vehicle with the informant. they drove down the road a short way and turned around then came back and dropped the suspect off at the end of Harriett Ln. the transaction took place darning [sic] this short ride down the road and back.

Corey's police report documenting the 7 November events states, in relevant part:

> I had the informant make a call to the suspect to set up a buy of cocaine. The suspect told the informant to meet with him at the same spot as last time (tem [sic] mile fork and hwy 17). . . .
>
> . . . .
>
> . . . . I then . . . sent him to the meeting location to make the buy of cocaine from the suspect.
>
> Deputy Ervin and I then went to set up where we were able to see the suspects home. I received a call from the informant telling me that the suspect had called him and changed the meeting location. The suspect told the informant to follow him and the [sic] went down hwy 17 and turned on Killis Murphy rd. and the suspect stopped and motioned for the suspect to come up to him as the informant approached the vehicle the suspect gave him a clear plastic bag with white powder inside and the informant gave him the $85.00 in US Currency.

On direct examination, Corey admitted that, at the time he wrote his affidavit, he knew that none of the drug buys took place at 133 Harriet Ln.

Although the trial court found that Corey testified that he was "talking about a seller coming from Harriet Lane, going to these specific places that he's disclosed to where the transactions actually took place,"

this finding is not supported as Corey never "disclosed" in the affidavit "these specific places . . . where the transactions actually took place." Moreover, although the trial court found that the allegations in the affidavit "don't actually say the buys took place at Harriet Lane . . . [t]hey just say 'the location,' " this finding is not supported as the plain language of the affidavit indicates that "this location" is 133 Harriet Ln. and that the alleged controlled drug buys and meetings between "Matt" and the informant took place at 133 Harriet Ln.

The trial court was itself misled by the statements in the affidavit. After it first reviewed Corey's affidavit on its face, and found that the magistrate relied solely on those factual allegations in issuing the search warrant, the trial court announced

> it appears that based on the information and personal observation of the detective, that a buy was made at the 133 Harriet Lane address in Pollocksville on October 9, 2014. And, as I read it, it seems to me the plain language of this affidavit is that on October 9, 2014, a gram of cocaine was purchased at that location from a subject by the name of Matt.

The trial court determined that two of the four drug buys took place "at that address on Harriet Lane" and concluded that probable cause existed to believe that "drug offenses were being committed at that address on Harriet Lane." Only after the *Franks* hearing, wherein Defendant introduced Corey's reports and questioned Corey, did the trial court understand that the buys did not take place at 133 Harriet Ln.

The trial court's conclusion that the statements were not false is not supported by the evidence presented at the *Franks* hearing, including the plain language of Corey's affidavit, his police reports, or his testimony. Contrary to the trial court's conclusion, Corey's statements in his affidavit indicating that the alleged controlled drug buys and meetings between "Matt" and the informant took place at 133 Harriet Ln. were false and his material omissions regarding the actual locations of the drug buys and meetings were misleading.

While "every false statement in an affidavit is not necessarily made in bad faith[,]" *State v. Severn*, 130 N.C. App. 319, 323, 502 S.E.2d 882, 885 (1998), in this case, Corey admitted that none of the controlled drug buys took place at 133 Harriet Ln. and that he knew this at the time he applied for the search warrant. By omitting that "Matt" drove from 133 Harriet Ln. to conduct the drug buys at locations over a mile away, and indicating instead that they had occurred at 133 Harriet Ln., Corey

knowingly made false statements. "A person may not knowingly make a false statement in good faith for the purposes of an affidavit in support of a search warrant." *Id.*

Because the statements indicating the drug buys and meetings between "Matt" and the informant were false and made in bad faith, they must be stricken from the affidavit. *Franks*, 438 U.S. at 155-56. If "the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Id.* at 156.

B. Probable Cause

[2] A magistrate's determination of probable cause must be based upon the totality of the circumstances. *State v. Benters*, 367 N.C. 660, 664, 766 S.E.2d 593, 597 (2014). Under the "totality of the circumstances" test,

> [t]he task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . concluding" that probable cause existed.

State v. Arrington, 311 N.C. 633, 638, 319 S.E.2d 254, 257-58 (1984) (brackets and citation omitted).

An application for a search warrant must be supported by statements "particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places . . . to be searched . . . ." N.C. Gen. Stat. § 15A-244(3). "Our case law makes clear that when an officer seeks a warrant to search a residence, the facts set out in the supporting affidavit must show some connection or nexus linking the residence to illegal activity." *State v. Bailey*, 374 N.C. 332, 335, 841 S.E.2d 277, 280 (2020). This nexus is generally established by "showing that criminal activity actually occurred at the location to be searched[.]" *State v. McCoy*, 100 N.C. App. 574, 576, 397 S.E.2d 355, 357 (1990). "[H]owever, where such direct information concerning the location of the objects is not available[,] . . . it must be determined what reasonable inferences may be entertained concerning the likely location of those items." *Id.* (quotation marks and citation omitted). "The affidavit

must also set forth circumstances from which the officer concluded that his informant was reliable." *State v. Altman*, 15 N.C. App. 257, 259, 189 S.E.2d 793, 795 (1972).

When Corey's false statements are stricken, the affidavit essentially alleges the following: There is an investigation involving the possibility of drugs and paraphernalia at 133 Harriet Ln. An informant was introduced who was to make controlled drug buys from 133 Harriet Ln. Investigators met with the informant on 9 October 2014. The informant stated he could make buys from "Matt," who lives at 133 Harriett Ln. and is known for dealing powder cocaine. The informant was able to buy an ounce of cocaine from Matt on 9 October 2014. Investigators met with the informant on 21 October 2014 and watched "Matt" come out of the Residence, meet with the informant, and go back into the Residence. Investigators met with the informant on 11 November 2014; "Matt" came from inside the Residence, sold drugs to the informant, then returned back inside the Residence. Investigators met with the informant on 25 November 2014; Matt would be getting more drugs and told the informant he would be good for whatever he needed.

The totality of the allegations potentially linking 133 Harriet Ln. to illegal activity are that "Matt" is known for dealing powder cocaine; "Matt" lives at 133 Harriet Ln.; and on 11 November 2014, "Matt" came from inside 133 Harriet Ln., sold drugs to the informant, then returned back inside 133 Harriet Ln. These allegations are not sufficient to show a nexus linking 133 Harriet Ln. to illegal activity. *See Bailey*, 374 N.C. at 338, 841 S.E.2d at 282 (holding that a nexus was established where a detective personally observed an encounter which he believed was a drug deal between two people who "had a history of dealing drugs"; the buyer was stopped shortly after purchasing the drugs and confirmed that she had just purchased heroin; that another officer continuously observed two of the participants travel from the drug deal to the residence; and that the detective knew that this was where the two participants lived).

There is no allegation that "Matt" sold the drugs to the informant from, on, or near 133 Harriet Ln.; no allegation that "Matt" was under continuous surveillance from the time he left 133 Harriet Ln. to the time he sold the drugs to the informant on 11 November 2014; and no allegation that the events on 11 November 2014 were based on Corey's own observation. *See State v. Campbell*, 282 N.C. 125, 131, 191 S.E.2d 752, 757 (1972) (holding an affidavit invalid where drugs were not possessed in or sold from the dwelling to be searched, but were instead found inside a trash can outside of the dwelling, and "[t]he inference the State [sought]

to draw from the contents of [the] affidavit . . . [did] not reasonably arise from the facts alleged"). The lack of nexus is even more stark when the omitted facts—the actual locations of the transactions, the fact that "Matt" drove to the first two transactions, and that the informant picked "Matt" up at the end of Harriet Ln. and conducted the transaction in the car—are read into the affidavit. *See United States v. Lull*, 824 F.3d 109, 118 (4th Cir. 2016) (determining that the investigators "omissions therefore prevented a neutral magistrate from being able to accurately assess the reliability and the veracity, and thus the significance, of the informant's statements").

Moreover, there are no allegations as to the reliability of the informant. *See Altman*, 15 N.C. App. at 259, 189 S.E.2d at 795 (The affiant's statement that the confidential informant "has proven reliable and credible in the past . . . are the irreducible minimum on which a warrant may be sustained.") (quotation marks omitted).

The allegations in the affidavit do not support a determination that there is a "fair probability that contraband or evidence of a crime will be found in" 133 Harriet Ln. *See McCoy*, 100 N.C. App. at 576, 397 S.E.2d at 357. Accordingly, " 'the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.' " *Severn*, 130 N.C. App. at 323, 502 S.E.2d at 884 (quoting *Franks*, 438 U.S. at 156).

III. Conclusion

The trial court erred by denying Defendant's motion to suppress, where Corey acted in bad faith by presenting the magistrate with false and misleading information and no probable cause existed to issue the search warrant. We reverse the trial court's order denying Defendant's motion to suppress and reverse the judgment entered upon Defendant's guilty plea.

REVERSED.

Chief Judge McGEE concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

Defendant failed to show the search warrant or the affidavit was false, made in bad faith, was contrary to the actual facts or was asserted

"to conceal from the defendant" how the evidence was obtained. *State v. Severn*, 130 N.C. App. 319, 323, 502 S.E.2d 882, 885 (1998). The majority's opinion erroneously substitutes its judgment on the evidence and findings, and reverses the trial court's denial of Defendant's motion to suppress. I respectfully dissent.

I. Standard of Review

The scope of this Court's review of a trial court's order denying a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Bone*, 354 N.C. 1, 7, 550 S.E.2d 482, 486 (2001) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)), *cert. denied*, 535 U.S. 940, 152 L. Ed. 2d 231 (2002)).

The trial court's conclusions of law are reviewed *de novo*. *State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993) (citation omitted), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). Whether an application for a search warrant is invalid for including false or misleading information is a conclusion of law that is also reviewed *de novo*. *See State v. Parks*, 265 N.C. App. 555, 570-73, 828 S.E.2d 719, 729-31 (2019), *disc. review denied*, 374 N.C. 265, 839 S.E.2d 851 (2020).

II. Analysis

A. False and Misleading Information

"A defendant may contest the validity of a search warrant and the admissibility of evidence attained from the evidence by contesting the truthfulness of the testimony showing probable cause for its issuance." N.C. Gen. Stat. § 15A-978(a) (2019). A "truthful" showing of the facts does not require "every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded . . . upon information received from informants, as well as . . . the affiant's own knowledge that sometimes must be garnered hastily." *State v. Fernandez*, 346 N.C. 1, 13, 484 S.E.2d 350, 358 (1997) (citing *Franks v. Delaware*, 438 U.S. 154, 165, 57 L. Ed. 2d 667, 678 (1978)). "Instead, truthful means that the information put forth is believed or appropriately accepted by the affiant as true." *Severn*, 130 N.C. App. at 322, 502 S.E.2d at 884 (citation and internal quotation marks omitted).

During the evidentiary hearing, only the affiant's veracity is at issue. *Id.* A defendant cannot suppress the warrant by simply presenting evidence which "contradicts assertions contained in the affidavit or . . .

shows the affidavit, contains false statements." *Id.* (citation omitted). Rather, the evidence presented "must establish facts from which the finder of fact might conclude that the affiant alleged the facts in bad faith." *Id.* (citation omitted).

Defendant asserts Detective Corey gave false information to the magistrate in bad faith because the drug buys did not take place at the residence, but rather from two separate locations. Defendant argues this case is analogous to *State v. Severn*. In *Severn*, during a drug investigation a detective surveilled the defendant's residence and searched through the defendant's trash bin, located outside of the residence. *Id.* at 321, 502 S.E.2d at 883. Inside the bin, the detective found "cocaine residue on the inside of [a] straw and two grams of marijuana." *Id.*

The detective applied for a search warrant. The detective claimed in an affidavit to have found the evidence inside the defendant's residence, by using "investigative means" in support of the search warrant. *Id.* at 320-21, 502 S.E.2d at 883-84. During the suppression hearing, the detective testified he had never "personally [gone] inside the residence" and he had "deduced that the [evidence] had been inside the residence." *Id.*

This Court held the detective knowingly made a false statement in bad faith because the statement was contrary to the actual facts, the detective knew it was false, and only did so "to conceal from the defendant" how the evidence was obtained. *Id.* at 323, 502 S.E.2d at 885.

In the present case, Defective Corey's affidavit stated: on 9 October 2014, the confidential informant was able to buy from "Matt, who lives at this location on Harriett Ln." On 21 October 2014, investigators met with the confidential informant to make a second buy from Matt, who lived at "the same location." During this drug buy, Detective Corey and other investigators watched the suspect known as Matt "come out of the house and meet with the [confidential] informant and return back" to the residence.

On 7 November 2014, "investigators met with the [confidential] informant to make a third buy from this location same as the last." The same suspect "Matt came from inside the home and made the deal then returned back inside the residence." On 25 November 2014, investigators met with the confidential informant to meet Matt and make a fourth "buy from this location."

Unlike in *Severn*, Detective Corey did not state anywhere in his affidavit that any of the drug buys were made at or from inside the Harriett Lane residence. Detective Corey testified that when he referred to "this

location" or "the same location," he was referring to the source or place from where Matt and the drugs are coming from, not the physical location of the drug buys. Defendant offers nothing to refute Detective Corey's testimony of the other assertions made in the application and affidavit. While the affidavit could have used clearer language, nothing asserted in the affidavit was false, made in bad faith, was contrary to the actual facts or was asserted "to conceal from the defendant" how the evidence was obtained. *Id.*

Unlike the inside/outside statement in the officer's affidavit from *Severn*, Detective Corey did not make any false statement in bad faith. *Id.* Defendant's argument is properly overruled.

B. Probable cause

The Fourth Amendment of the Constitution of the United States provides "no [w]arrants shall issue, but upon probable cause, supported by [o]ath or affirmation, and particularity describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. Our Supreme Court has adopted the "totality of the circumstances" test for determining whether probable cause exists for issuance of a search warrant under the state's constitution. *State v. Lowe*, 369 N.C. 360, 364, 794 S.E.2d 282, 285 (2016).

Under this test, an application for a search warrant must be supported by an affidavit detailing "the facts and circumstances establishing probable cause to believe that the items are in the places . . . to be searched." N.C. Gen. Stat. § 15A-244(3) (2019). The information contained in the affidavit "must establish a nexus between the objects sought and the place to be searched." *State v. McCoy*, 100 N.C. App. 574, 576, 397 S.E.2d 355, 357 (1990) (citation omitted). A magistrate must "make a practical, common-sense decision," based upon the totality of the circumstances, whether "there is a fair probability that contraband" will be found in the place to be searched. *Illinois v. Gates*, 462 U.S. 213, 238, 76 L. Ed. 2d 527, 548 (1983).

Unlike the majority's opinion's analysis, the judicial officer's determination of probable cause is to be given "great deference" and "after-the-fact scrutiny should not take the form of a *de novo* review." *State v. Arrington*, 311 N.C. 633, 638, 319 S.E.2d 254, 258 (1984). Instead, as the trial court found, a reviewing court is responsible for ensuring that the issuing magistrate had a "substantial basis for . . . conclud[ing] that probable cause existed." *Gates*, 462 U.S. at 238-39, 76 L. Ed. 2d at 548 (citation omitted).

The trial court's order asserts the following factors, *inter alia*, to support the magistrate's finding of probable cause: (1) a confidential informant advised the investigators he was able to make illegal drug buys from Matt, who resided at the residence at Harriett Lane; (2) Detective Corey dispatched the confidential informant to make "buys" of illegal drugs from Matt on four separate occasions; (3) on 9 October 2014 the confidential informant purchased a gram of cocaine from Matt; (4) on every occasion, Detective Corey witnessed Matt leave the residence at Harriett Lane, meet with the confidential informant to complete the buy, and return to the residence; and, (5) on 25 November 2014, Matt told the confidential informant he was, "re-upping," getting more drugs, and would be "good" for further supply. Defendant's argument is properly overruled.

1. Stale Information

Defendant argues the evidence described in Detective Corey's affidavit was stale. "Generally, two factors determine whether evidence of previous criminal activity is sufficient to later support a search warrant: (1) the amount of criminal activity and (2) the time period over which the activity occurred." *McCoy*, 100 N.C. App. at 577, 397 S.E.2d at 358.

"[W]here the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant." *Id.* (citation omitted). This Court has held evidence, which occurred twenty months prior to the execution of a search warrant, was not so far removed to be considered stale as a matter of law. *State v. Howard*, 259 N.C. App. 848, 854, 817 S.E.2d 232, 237 (2018).

Over the course of only two months, the confidential informant was able to complete four illegal drug-related transactions with Matt while he resided at the residence on Harriett Lane. The last buy occurred eighteen days before the search warrant was issued. The last interaction, when Matt informed the confidential informant, he was re-upping his supply, occurred on the same day the search warrant was issued by the magistrate. The evidence of the four separate buys from Matt who lived at Harriett Lane and was described in the affidavit was not stale. A short time had passed from the last interaction with Matt, the search warrant being issued, and the search warrant being executed. Defendant's argument is properly overruled.

2. Reliable Information

Defendant also argues the application and affidavit did not establish probable cause because Detective Corey's affidavit did not show the

confidential informant was reliable. This Court has held probable cause may be shown through tips and information provided by informants. *State v. Brown*, 199 N.C. App. 253, 257, 681 S.E.2d 460, 463 (2009). "The indicia of reliability of an informant's tip" includes: (1) "whether the informant was known or anonymous, (2) the informant's history of reliability, and (3) whether information provided by the informant could be independently corroborated by the police." *Id.* at 258, 681 S.E.2d at 463 (citation omitted).

The information provided by the confidential informant was independently verified by Detective Corey, who surveilled all four illicit drug interactions as they occurred between "Matt" and the confidential informant at the residence. Also, officers met with the confidential informant on 9 October 2014 and then had the confidential informant buy one gram of cocaine from Matt on the same day. The affidavit states the confidential informant was involved in an ongoing drug investigation in Jones County. The magistrate could reasonably have concluded the informant was known to the investigator from the multiple transactions and had a history of reliability. Defendant's argument is overruled.

Finally, applying the totality of circumstances test, the trial court properly concluded a substantial basis was shown for finding probable cause to search the residence. The confidential informant had purchased drugs from Matt at least four times in a two-month period while Matt had lived at the residence. Detective Corey witnessed Matt leave the residence, meet with the confidential informant, the illicit exchanges occur, and Matt return to the residence. Matt told the confidential informant he had resupplied his drug inventory the day before the search warrant was issued.

The nexus and chain of custody between the residence, Matt, the informant, and the contraband recovered therefrom on numerous occasions was sufficiently established by the application and Detective Corey's affidavit. A substantial basis was presented for the magistrate to conclude illegal drugs were located inside of the residence and to deny Defendant's motion to suppress. Probable cause supports the issuance of the warrant to search the residence. Defendant's arguments are properly overruled.

III. Conclusion

Defendant failed to show Detective Corey provided false and misleading information or used bad faith in preparing the application for the search warrant and his supporting affidavit to the magistrate. Tßhe search warrant was based upon timely and reliable information of

multiple drug transactions over a two-month period to support probable cause to search the residence. Using the proper appellate standard of review of the trial court's order, Defendant's motion to suppress was properly denied. The judgments entered upon Defendant's guilty plea are properly affirmed. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
SHELLEY ANNE OSBORNE

No. COA18-9-2

Filed 15 December 2020

1. Drugs—issue preservation—immunity from prosecution—seeking medical assistance for drug overdose—not jurisdictional

The Court of Appeals held that N.C.G.S. § 90-96.2(c)—which provides that a person suffering from a drug overdose shall not be prosecuted for certain drug-related crimes if the evidence of those crimes was obtained because the person sought medical assistance relating to the overdose—does not impose a jurisdictional limit that can be raised at any time, but rather it contains a traditional immunity defense that must be raised in the trial court to be preserved for appellate review. Therefore, a defendant convicted of possession of heroin waived any arguments on appeal concerning immunity from prosecution under section 90-96.2(c) by failing to raise them at trial.

2. Evidence—drug possession—field tests and officer lay testimony identifying heroin—plain error analysis

In a prosecution for possession of heroin, which arose from a phone call to police about defendant's possible overdose in a hotel room, the trial court did not commit plain error by admitting into evidence field test results and officer lay testimony identifying the substance found in the hotel room as heroin. Defendant never objected to this evidence at trial, and even if the court had excluded the test results and lay testimony, the State presented ample other evidence that defendant possessed heroin, including defendant's statement to law enforcement at the scene that she had used heroin and the officers' discovery of a rock-like substance resembling heroin and drug paraphernalia typically used for consuming heroin.

On remand by opinion of the North Carolina Supreme Court filed 16 August 2019 in *State v. Osborne*, 372 N.C. 619, 831 S.E.2d 328 (2019), reversing and remanding this Court's decision filed 2 October 2018. Case originally appealed by defendant from judgments entered 21 February 2018 by Judge Edwin G. Wilson Jr. in Randolph County Superior Court. Heard in the Court of Appeals 20 August 2018 and 23 September 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Alesia Balshakova and Assistant Attorney General Kristin J. Uicker, for the State.

Meghan Adelle Jones for defendant.

Hicks McDonald Noecker LLP, by David W. McDonald, court-assigned amicus curiae.

DIETZ, Judge.

Under state law, a person suffering a drug overdose "shall not be prosecuted" for certain drug crimes if the evidence of those crimes was obtained because the person sought medical assistance. N.C. Gen. Stat. § 90-96.2(c). The obvious purpose of this statute is to save lives by encouraging people to call emergency personnel when someone is experiencing a drug overdose.

On remand from the Supreme Court, the central issue in this appeal is whether this statute, which the General Assembly described as an "immunity," is a jurisdictional limit that can be raised at any time, or is a more traditional immunity defense that must be raised and preserved at trial. This is a critical question because Defendant Shelley Anne Osborne never raised this issue, either in the trial court or on appeal. The question is before us solely because a Supreme Court justice, in a concurring opinion in this case, invited this Court to examine it on remand.

As explained below, our State's criminal laws treat immunity from prosecution and subject matter jurisdiction as distinct concepts. Thus, we can interpret an immunity provision as jurisdictional only if the statute's language provides a "clear indication" that it is meant to be jurisdictional. That is not the case with this statute, and we therefore hold that N.C. Gen. Stat. § 90-96.2(c) contains a traditional immunity defense that must be raised by the defendant in the trial court to be preserved for appellate review.

We therefore decline to address this issue because it was not raised and preserved for appellate review. We also find no plain error in the remaining arguments before us on remand.

Facts and Procedural History

In late 2014, police responded to a call about a possible overdose in a hotel room. After arriving at the hotel room, officers found Defendant Shelley Anne Osborne in the bathroom. She was unconscious, unresponsive, and turning blue. Osborne regained consciousness after emergency responders arrived and administered an anti-overdose drug. When Osborne regained consciousness, she told an officer that she "had ingested heroin."

The responding officers searched the hotel room and found Osborne's two children, who were around four or five years old. The officers also found multiple syringes, spoons with burn marks and residue on them, and a rock-like substance that appeared to be heroin. An officer conducted a field test on the rock-like substance, which yielded a "bluish color" indicating a "positive reading for heroin."

The State charged Osborne with possession of heroin and two counts of misdemeanor child abuse. At trial, law enforcement officers testified about discovering the rock-like substance; described how it resembled heroin; explained the results of the field test indicating the substance was heroin; and discussed how other objects found in the hotel room, including the syringes and spoons with burn marks, were common paraphernalia used to consume heroin. An officer also performed a field test on the substance seized from the hotel room in open court and displayed the results to the jury. Osborne did not object to any of this evidence.

The jury convicted Osborne on all charges, and the trial court sentenced her to 6 to 17 months in prison for possession of heroin and a consecutive sentence of 60 days for the two counts of misdemeanor child abuse. The trial court suspended both sentences. Osborne appealed.

This Court vacated Osborne's conviction for possession of heroin, reasoning that there was no scientifically valid chemical analysis or other sufficient testimony to establish that the alleged unlawful substance was heroin. *State v. Osborne*, 261 N.C. App. 710, 715, 821 S.E.2d 268, 272 (2018), *rev'd and remanded*, 372 N.C. 619, 831 S.E.2d 328 (2019).

The Supreme Court took the case on discretionary review, reversed this Court's holding with respect to the sufficiency of the evidence, and remanded with instructions to consider Osborne's plain error

evidentiary challenge, which was mooted by this Court's prior opinion. *State v. Osborne*, 372 N.C. 619, 632, 831 S.E.2d 328, 337 (2019).

At oral argument and in a concurring opinion, Justice Earls discussed a state statute, N.C. Gen. Stat. § 90-96.2, that provides "limited immunity" for certain crimes connected to a drug overdose. Justice Earls invited this Court to "also address on remand the question of the application of N.C.G.S. § 90-96.2 to this case" including "whether the Good Samaritan/Naloxone Law is a limit on the court's jurisdiction to prosecute the defendant in this case" or, "if not purely jurisdictional, whether it is an issue that can be waived." *Id.* at 633, 636, 831 S.E.2d at 338–339 (Earls, J., concurring).

On remand to this Court, we ordered supplemental briefing from the parties on the issue identified in the concurring opinion from the Supreme Court. Osborne's counsel filed a notice "respectfully declining to submit supplemental briefing." Counsel explained that a "lien will be entered" against Osborne for the attorneys' fees and expenses of court-appointed counsel "because our Supreme Court denied her the highest relief sought on appeal." Thus, counsel explained, Osborne "has not given the undersigned authorization" to file a supplemental brief which would result in additional attorneys' fees and expenses from counsel.

In response, this Court appointed David W. McDonald as court-assigned amicus curiae to address the issues identified in the supplemental briefing order from Osborne's perspective.

Analysis

I. Statutory immunity under N.C. Gen. Stat. § 90-96.2

[1] We first address the statutory immunity issue raised by the concurring opinion from the Supreme Court. At the time of Osborne's trial, N.C. Gen. Stat. § 90-96.2(c) provided that any "person who experiences a drug-related overdose and is in need of medical assistance shall not be prosecuted" for felony possession of less than one gram of heroin if the evidence for the prosecution "was obtained as a result of the drug-related overdose and need for medical assistance." *Id.* (amended 2015).

The threshold question for this Court is whether we may consider this issue at all. Osborne never raised the issue—not in the trial court and not on appeal. The issue arose, for the first time, in questions from a justice at the oral argument in the Supreme Court.

Ordinarily, "to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion."

N.C. R. App. P. 10(a)(1). Issues not raised in the trial court are waived on appeal. *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600 (2003).

But this waiver rule does not apply to defects in the trial court's subject matter jurisdiction because subject matter jurisdiction "cannot be conferred by consent or waiver." *State v. Mauck*, 204 N.C. App. 583, 586, 694 S.E.2d 481, 483 (2010). As a result, an "issue of subject matter jurisdiction may be raised at any time, and may be raised for the first time on appeal." *State v. Frink*, 177 N.C. App. 144, 147, 627 S.E.2d 472, 473 (2006). The interaction of these two contrasting preservation rules means that our ability to consider this statutory immunity argument turns on whether it impacts the trial court's subject matter jurisdiction.

We hold that it does not. "The extent, if any, to which a particular statutory provision creates a jurisdictional requirement hinges upon the meaning of the relevant statutory provisions." *State v. Brice*, 370 N.C. 244, 251, 806 S.E.2d 32, 37 (2017). In interpreting a statute, our task "is to determine the meaning that the legislature intended upon the statute's enactment. The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish." *State v. Rieger*, 267 N.C. App. 647, 649, 833 S.E.2d 699, 700–01 (2019) (citation omitted).

We begin with the statute's plain language. The relevant provision is contained in a statute entitled "Drug-related overdose treatment; limited immunity." The relevant provision then describes how, if certain conditions are met, a person experiencing an overdose "shall not be prosecuted" based on evidence obtained when emergency personnel respond to provide medical assistance. N.C. Gen. Stat. § 90-96.2.

This statutory language indicates Section 90-96.2(c) creates an immunity from prosecution. This type of immunity, to be fair, is stronger than a typical affirmative defense. Immunities are not mere bars to conviction or judgment; they are protections against being charged or haled into court at all. *See generally Ballard v. Shelley*, 257 N.C. App. 561, 564, 811 S.E.2d 603, 605 (2018). Even so, immunities are not ordinarily treated as matters of subject matter jurisdiction; immunities generally are waived if not asserted and cannot be raised for the first time on appeal. *See, e.g.*, *Lambert v. Town of Sylva*, 259 N.C. App. 294, 301, 816 S.E.2d 187, 193 (2018); *Nw. Fin. Grp., Inc. v. Cty. of Gaston*, 110 N.C. App. 531, 534, 430 S.E.2d 689, 691 (1993).

But the use of the phrase "immunity" in Section 90-96.2(c) is not determinative. The General Assembly is "free to attach the conditions that go with the jurisdictional label" to something that typically is not

jurisdictional. *Tillett v. Town of Kill Devil Hill*s, 257 N.C. App. 223, 225, 809 S.E.2d 145, 148 (2017). This means the General Assembly could label a provision an "immunity" but have that provision deprive trial courts of subject matter jurisdiction. For this to occur, there must be a "clear indication that the provision was meant to carry jurisdictional consequences." *Id.*

Here, that is not the case. Nothing in N.C. Gen. Stat. § 90-96.2(c) contains a clear indication that it must be jurisdictional. The statute "uses the term 'shall not' which is mandatory, not permissive." *State v. Osborne*, 372 N.C. 619, 636, 831 S.E.2d 328, 339 (2019) (Earls, J., concurring). But our Supreme Court has acknowledged that statutory provisions often "are couched in mandatory terms" but "that fact, standing alone, does not make them jurisdictional in nature." *Brice*, 370 N.C. at 253, 806 S.E.2d at 38. Moreover, other portions of our State's criminal statutes, applicable in this case, distinguish between immunities and jurisdictional arguments. For example, under N.C. Gen. Stat. § 15A-954, there are separate categories describing how to move to dismiss when the "defendant has been granted immunity by law from prosecution" and when the "court has no jurisdiction of the offense charged." *Id.* § 15A-954(a)(8), (9). Again, this demonstrates that the General Assembly views immunities and subject matter jurisdiction as distinct legal concepts. When drafting N.C. Gen. Stat. § 90-96.2(c), the legislature could have included language signaling that this provision was different from other immunities and should be treated as jurisdictional. It did not do so.

In sum, we hold that N.C. Gen. Stat. § 90-96.2(c) does not contain a clear indication that it is a jurisdictional requirement, and we therefore treat the provision as one granting traditional immunity from prosecution. This type of immunity must be asserted as a defense by the defendant in the trial court proceeding. *State v. Rankin*, 371 N.C. 885, 889, 821 S.E.2d 787, 792 (2018). The failure to raise the issue waives it and precludes further review on appeal. *Haselden*, 357 N.C. at 10, 577 S.E.2d at 600.

Applying these principles, we hold that Osborne waived any arguments concerning immunity from prosecution under N.C. Gen. Stat. § 90-96.2(c) by failing to raise the argument in the trial court. We thank the court-assigned amicus curiae for the well-reasoned supplemental briefing and thoughtful arguments to this Court, but we ultimately conclude that the arguments raised by the amicus cannot be considered by this Court on direct appeal. Osborne must raise those arguments, if at all, through a motion for appropriate relief in the trial court asserting ineffective assistance of counsel.

II. Plain error challenge to drug identification

[2] We next address Osborne's remaining argument from her initial appellate brief. Osborne argues that the trial court committed plain error by admitting the results of field tests conducted on the alleged heroin found at the crime scene and by admitting the lay testimony of officers explaining that the substance resembled heroin.

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). Our Supreme Court has emphasized that we should invoke the plain error doctrine "cautiously and only in the exceptional case" where the consequences of the error seriously affect "the fairness, integrity or public reputation of judicial proceedings." *Id.* (citation omitted).

Here, law enforcement officers responded to a call about a possible overdose in a hotel room and found Osborne unconscious. When Osborne regained consciousness, she told the officers that she had used heroin. Officers found a rock-like substance resembling heroin in the hotel room. They also found drug paraphernalia, such as syringes and spoons with burn marks and residue, that are used for consuming heroin. To be sure, much of the State's evidence identifying that rock-like substance as heroin, such as the field test results, might have been excluded had Osborne objected. But she did not object. And, as explained above, the State had compelling evidence that the substance was heroin even setting aside the challenged evidence. Indeed, our Supreme Court described the record in this case as containing "ample evidence tending to show that the substance that defendant allegedly possessed was heroin." *Osborne*, 372 N.C. at 631, 831 S.E.2d at 337. In sum, the trial court's decision not to intervene, on the court's own initiative, to exclude some of this evidence, when there was "ample" evidence that the substance was heroin, is simply not the sort of fundamental error that calls into question the "fairness, integrity or public reputation of judicial proceedings." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citation omitted). Accordingly, we find no plain error in the trial court's judgment.

Conclusion

We find no plain error in the trial court's judgment.

NO PLAIN ERROR.

Chief Judge McGEE and Judge HAMPSON concur.

STATE v. ROBINSON

[275 N.C. App. 330 (2020)]

STATE OF NORTH CAROLINA
v.
LEWIE P. ROBINSON

No. COA19-474

Filed 15 December 2020

1. Appeal and Error—guilty plea—review by certiorari

Where defendant lacked the statutory authority to appeal from his guilty plea to the charges of assault on a female, violation of a domestic violence protective order, assault inflicting serious bodily injury, and assault by strangulation, he petitioned the Court of Appeals for a writ of certiorari for appellate review of four issues. The Court allowed the petition for the limited purpose of reviewing only one argument regarding the factual basis of his guilty plea to three assault charges.

2. Assault—guilty plea to multiple assaults—no evidence of distinct interruption in original assault

In a case where defendant pleaded guilty to charges of assault on a female, violation of a domestic violence protective order, assault inflicting serious bodily injury, and assault by strangulation, the trial court erred by accepting defendant's guilty plea to—and entering judgment on—the three assault charges because the State's factual summary and other evidence before the court indicated a singular assault without a distinct interruption in the original assault followed by a second assault. Although defendant held the victim captive for three days, that fact alone was insufficient to support a conclusion that multiple assaults occurred during that period.

3. Sentencing—assault—multiple charges arising from the same conduct—sentencing only on charge with greatest punishment

Where defendant pleaded guilty to assault on a female, assault inflicting serious bodily injury, and assault by strangulation, but the factual basis for defendant's guilty plea as presented by the prosecutor only supported one assault conviction, defendant could only be sentenced on one charge—the one that carried the greatest punishment.

Judge BERGER dissenting.

Appeal by defendant by writ of certiorari from judgments entered 5 December 2018 by Judge Marvin P. Pope, Jr., in Buncombe County Superior Court. Heard in the Court of Appeals 22 January 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Jessica Macari, for the State.

Dylan J.C. Buffum for defendant-appellant.

ZACHARY, Judge.

Defendant Lewie P. Robinson appeals from judgments entered upon his guilty plea to one count each of (1) assault on a female, (2) violation of a domestic violence protective order, (3) assault inflicting serious bodily injury, and (4) assault by strangulation. Defendant has filed a petition for writ of certiorari seeking review of his guilty plea. In our discretion, we allow his petition for the limited purpose of reviewing his challenge to the factual basis for his plea arrangement. After careful review, we conclude that there was an insufficient factual basis for Defendant's guilty plea. Moreover, the trial court was not authorized to enter judgment and sentence Defendant for two lesser assault offenses based on the same conduct as that underlying his conviction for assault inflicting serious bodily injury. *See State v. Fields*, 374 N.C. 629, 633, 843 S.E.2d 186, 189 (2020). Accordingly, we remand the judgments entered in 18 CRS 85370 and 18 CRS 85784 to the trial court with instructions to arrest judgment on Defendant's convictions for assault on a female and assault by strangulation. We affirm the remaining judgments.

Background

At the time of the events in question, Leslie Wilson was dating Defendant and, over the course of their relationship, she was repeatedly the victim of domestic violence. On or about 25 May 2018, Wilson and Defendant were drinking beer together when she noticed that Defendant "was getting ill[.]" Fearful that he would become violent, Wilson poured out the rest of the beer and locked herself in the bathroom. Defendant "broke two doors" attempting to reach Wilson in order to find out where she "hid the beer." He eventually gained entry into the bathroom and attacked her. Defendant held Wilson down on a bed and strangled her "with his elbow on [her] jawbone and [her] throat." Wilson "blacked out twice."

Defendant purportedly held Wilson captive for the next three days, when she was finally able to call 911.[1] Wilson required medical treatment, and she "was unable to eat food properly for about six weeks after the assault due to the condition of her [broken] jaw[.]" Defendant was

1. It is unclear from the record precisely when during Wilson's captivity the assault occurred.

subsequently charged with assault on a female, violation of a domestic violence protective order, assault inflicting serious bodily injury, and assault by strangulation.

On 5 December 2018, Defendant's case came on for hearing in Buncombe County Superior Court before the Honorable Marvin P. Pope, Jr. Defendant agreed to plead guilty to each of the charged offenses. Under the terms of the proposed plea arrangement, the State agreed to consolidate the offenses into one Class F felony judgment, with Defendant receiving a sentence of 23–37 months in the custody of the North Carolina Division of Adult Correction.

The prosecutor presented the trial court with a statement of the factual basis for Defendant's guilty plea. However, after learning of Defendant's history of domestic violence and hearing Wilson's account of the events underlying his plea, the trial court rejected the proposed plea arrangement. The court provided the parties with an opportunity to renegotiate, and twenty-four minutes later, the parties presented the trial court with a modified plea arrangement, which did not provide for consolidated charges. Instead, under the terms of the modified plea arrangement, Defendant agreed to serve 23–37 months in prison for the Class F felony of assault inflicting serious bodily injury, followed by 15–27 months' imprisonment for the Class H felony of assault by strangulation. As for the Class A1 misdemeanor offenses of assault on a female and violation of a domestic violence protective order, Defendant agreed to serve two 150-day suspended sentences "with supervised probation, consecutive to each other if ever activated."

The trial court accepted Defendant's guilty plea upon the prosecutor's prior statement of the factual basis, and entered judgment accordingly.

Petition for Writ of Certiorari

[1] A criminal defendant's limited right of appeal following his plea of guilty is provided by N.C. Gen. Stat. § 15A-1444(a1)-(a2) (2019). *State v. Jones*, 253 N.C. App. 789, 792, 802 S.E.2d 518, 521 (2017). The statute "explicitly grants [a] defendant the right to petition the appellate division for review by writ of certiorari." *Id.* at 793, 802 S.E.2d at 521 (internal quotation marks omitted). This Court may issue the writ of certiorari "in appropriate circumstances." N.C.R. App. P. 21(a)(1). The writ is discretionary, "to be issued only for good and sufficient cause shown." *State v. Rouson*, 226 N.C. App. 562, 563–64, 741 S.E.2d 470, 471 (citation omitted), *disc. review denied*, 367 N.C. 220, 747 S.E.2d 538 (2013). "A petition for the writ must show merit or that error was probably committed below." *Id.*

Lacking the statutory authority to appeal his case, on 5 August 2019, Defendant petitioned this Court to issue its writ of certiorari in accordance with N.C. Gen. Stat. § 15A-1444. Defendant requests review of the following issues: (1) that "the trial court placed improper pressure on [him] to enter a plea 'today' after rejecting the parties' negotiated agreement"; (2) that "[t]here was an insufficient factual basis for the trial court to accept a plea and enter judgments on two of the three assault charges" where the evidence failed to establish more than one assault; (3) that "[t]he trial court considered improper and irrelevant matters at sentencing"; and (4) that the trial court denied him "his right of allocution at the sentencing hearing."

This Court may choose to issue its writ of certiorari "to review some issues that are meritorious but not others for which a defendant has failed to show good or sufficient cause." *State v. Ross*, 369 N.C. 393, 400, 794 S.E.2d 289, 293 (2016). After reviewing the record and arguments of the parties, we deny Defendant's petition for writ of certiorari as to the first, third, and fourth issues for which he requests appellate review. In our discretion, we allow his petition solely for the limited purpose of reviewing Defendant's second argument regarding the sufficiency of the factual basis for his guilty plea to three assault charges.[2]

Discussion

Defendant contends that "[t]here was an insufficient factual basis for the trial court to accept a plea and enter judgments on two of the three assault charges." We agree.

I. Standard of Review

Defendant raises an issue of statutory construction. "Issues of statutory construction are questions of law, reviewed de novo on appeal." *State v. Jamison*, 234 N.C. App. 231, 238, 758 S.E.2d 666, 671 (2014) (citation omitted). In reviewing an issue de novo, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (citation omitted).

II. Factual Basis for the Plea

[2] Defendant argues that "[t]he trial court erred when it accepted a plea and entered judgment on three assault charges because the State's

2. We have previously allowed petitions for the writ of certiorari in order to permit review of appeals concerning the adequacy of the factual bases underlying defendants' guilty pleas. *See, e.g.*, *State v. Keller*, 198 N.C. App. 639, 641–42, 680 S.E.2d 212, 213–14 (2009).

factual summary and other evidence before the trial court did not establish more than one assault." For the following reasons, we agree.

"[G]uilty pleas must be substantiated in fact as prescribed by" N.C. Gen. Stat. § 15A-1022(c). *State v. Agnew*, 361 N.C. 333, 335, 643 S.E.2d 581, 583 (2007). "The judge may not accept a plea of guilty . . . without first determining that there is a factual basis for the plea." N.C. Gen. Stat. § 15A-1022(c). A factual basis may be provided by, *inter alia*, "[a] statement of the facts by the prosecutor." *Id.* § 15A-1022(c)(1). The trial court may also "consider any information properly brought to [its] attention in determining whether there is a factual basis for a plea of guilty[.]" *State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 186 (1980).

In the instant case, the State's summary of the factual basis for the plea was brief:

> Your Honor, this occurred on May the 28th, 2018. Officers responded just after midnight that morning, Your Honor, to 37 Amirite Drive, A-m-i-r-i-t-e, Drive in Candler, North Carolina. The caller was Ms. Leslie Wilson who is present today, Your Honor. She stated that she'd been held captive by [D]efendant for three days and there was an active [domestic violence protective order] in place.
>
> When officers arrived, Ms. Wilson was present and stated that [D]efendant, had grabbed her around the neck and that while he was choking her she had taken a box cutter from him. During the assault that occurred over that night, Your Honor, Ms. Wilson was punched a number of times causing a broken jaw and a dislodged breast implant. She also had small cuts on her hands that were consistent with the altercation, as well as bruising around her neck. Ms. Wilson describes that during the strangulation she was unable to breathe and felt like she was going to pass out. She had tenderness about her neck for a few days after. Additionally, she was unable to eat food properly for about six weeks after the assault due to the condition of her jaw, Your Honor. Thankfully, thanks to health insurance, she was not out-of-pocket any money for restitution which is why we're not seeking restitution in this case.

The State further noted that Wilson was "ready to move on with this relationship and . . . this case[.]"

The State's factual summary indicated that this was a singular assault, without distinct interruption, during which Wilson was strangled, beaten, and cut. However, "[i]n order for a defendant to be charged with multiple counts of assault, there must be multiple assaults. This requires evidence of a *distinct interruption* in the original assault followed by a second assault." *State v. Williams*, 201 N.C. App. 161, 182, 689 S.E.2d 412, 424 (2009) (emphasis added) (citation omitted).

"[T]he dispositive issue . . . is whether the State presented substantial evidence of an interruption" between the assaults. *State v. Littlejohn*, 158 N.C. App. 628, 635, 582 S.E.2d 301, 307, *disc. review denied*, 357 N.C. 510, 588 S.E.2d 377 (2003); *see also State v. McPhaul*, 256 N.C. App. 303, 304, 318, 808 S.E.2d 294, 298, 306 (2017) (determining that there was no evidence of a distinct interruption in the assault where (1) the victim was first "hit on the head from behind and fell to the ground"; (2) after attempting to stand back up, the victim was "hit . . . in the right shin with a metal baseball bat," causing him to fall again; and (3) while on the ground, the victim was struck again in the face), *disc. review improvidently allowed*, 371 N.C. 467, 818 S.E.2d 102 (2018) (per curiam); *State v. Brooks*, 138 N.C. App. 185, 188–90, 530 S.E.2d 849, 852–53 (2000); *State v. Dilldine*, 22 N.C. App. 229, 231, 206 S.E.2d 364, 366 (1974).

In the case at bar, nothing in the State's factual summary suggests that there was a distinct interruption that would support multiple assault convictions. Close examination of the prosecutor's language shows that she only referenced a singular assault during her summary of the factual basis for the plea arrangement, in which she described "*the assault* that occurred over that night[.]" (Emphasis added). The prosecutor also mentioned cuts on Wilson's hands that "were consistent with *the altercation*"—again, singular—between Wilson and Defendant. (Emphasis added). Moreover, Wilson's statement to the trial court at the hearing provided no evidence of a distinct interruption in the assault:

> We were both drinking and he was getting ill, so I dumped all the beer out. Dumped out everything I could find. And then I locked myself in the bathroom. And he broke two doors trying to get to me and he kept telling me to tell him where I had hid the beer. I didn't want to tell him then that I'd poured it out because I was so afraid. But I poured it out, trying to keep him from getting to this point. And then he got after me and I had a box cutter, which I was trying to defend myself at that point, and he held me down on the bed. I actually blacked out twice. And when he was strangling me and told me I needed to learn where the pressure

> points was, with his elbow on my jawbone and my throat. And then when I got back up I did -- I had the box cutter but I was trying -- I was scared to death. I thought he was going to kill me. I couldn't even hardly talk.

The fact that Defendant held Wilson captive for three days does not, alone, compel the conclusion that he committed multiple assaults against Wilson during that period. Given the factual summary delivered by the State, and the lack of "substantial evidence of an interruption" in the assault, *Littlejohn*, 158 N.C. App. at 635, 582 S.E.2d at 307, we conclude that Defendant has shown that the State did not provide a sufficient factual basis for the trial court to accept his guilty plea and enter judgments on multiple assault charges.

III. Separate Punishments

[3] Defendant further maintains that, because the State's factual basis for his guilty plea was insufficient to support multiple assault convictions, we should "vacate the judgments in this matter and remand to the trial court with instructions to arrest the judgments" for assault on a female and assault by strangulation.

Identical prefatory language is found in N.C. Gen. Stat. §§ 14-32.4(a), (b), and 14-33(c), with each providing that these statutes apply "[u]nless the conduct is covered under some other provision of law providing *greater* punishment[.]" N.C. Gen. Stat. §§ 14-32.4(a)-(b), 14-33(c) (emphasis added). Our Supreme Court recently addressed this prefatory language in *State v. Fields*, 374 N.C. at 632, 843 S.E.2d at 189. In that case, the issue presented was "whether [the] defendant could lawfully be convicted and sentenced for both habitual misdemeanor assault and felony assault where both offenses arose from the same assaultive act." *Id.* The *Fields* Court agreed with this Court's previous conclusion that the defendant "could not be separately convicted and punished for both misdemeanor assault and felony assault based on the same conduct due to the above-quoted prefatory language[.]" *Id.* at 633, 843 S.E.2d at 189.

In reaching this conclusion, our Supreme Court was guided by its review of identical prefatory language in another criminal statute. *Id.* at 634, 843 S.E.2d at 190. In *State v. Davis*, 364 N.C. 297, 306, 698 S.E.2d 65, 70 (2010), the issue was whether the defendant could be sentenced and punished for both felony serious injury by vehicle and assault with a deadly weapon inflicting serious injury arising from the same underlying conduct. *Davis*, 364 N.C. at 298, 698 S.E.2d at 66. The *Davis* Court held that the General Assembly's inclusion of the same prefatory language found in N.C. Gen. Stat. § 20-141.4(b) (establishing punishments

for various death or serious injury by vehicle offenses) as in those sections at issue here signaled the legislature's intention not to "authorize punishment for the enumerated offenses when punishment is imposed for higher class offenses that apply to the same conduct." *Id.* at 305, 698 S.E.2d at 70. "In such situations . . . the General Assembly intended an alternative: that punishment is *either* imposed for the more heavily punishable offense *or* for the section 20-141.4 offense, but not both." *Id.* at 304, 698 S.E.2d at 69. Accordingly, "the trial court . . . was not authorized to sentence [the] defendant for felony death by vehicle and felony serious injury by vehicle" in contravention of the clear intent and plain language of our General Assembly. *Id.* at 305, 698 S.E.2d at 70.

Based on the holding in *Davis*, the *Fields* Court concluded that "this same prefatory language would serve to prevent [the] defendant from being separately punished for both misdemeanor assault and felony assault." *Fields*, 374 N.C. at 634, 843 S.E.2d at 190. The *Fields* Court further explained that the absence of similar prefatory language in the habitual misdemeanor assault statute did not render that language wholly inapplicable. *Id.* Indeed, "in order for [the] defendant to be guilty of habitual misdemeanor assault, his conduct had to have first violated the misdemeanor assault statute." *Id.* at 635, 843 S.E.2d at 190.

> [The] defendant's guilt of habitual misdemeanor assault required that he first have violated the misdemeanor assault statute. But because the prefatory language of the misdemeanor assault statute was triggered, his conduct was not deemed to constitute a violation of that statute. Thus, absent a violation of the misdemeanor assault statute, he could not be guilty of habitual misdemeanor assault, and as a result, the trial court erred in sentencing him for that offense.

Id. at 635, 843 S.E.2d at 191.

In sum,

> [t]he effect of the prefatory language . . . did not simply disappear upon the misdemeanor assault conviction being upgraded to a conviction for habitual misdemeanor assault. Accordingly, the fact that the General Assembly did not repeat the prefatory language in the habitual misdemeanor assault statute is of no consequence. Once [the] defendant was found guilty of both misdemeanor assault and felony assault, this invoked the prefatory language of the misdemeanor assault statute, which served

> to invalidate the misdemeanor assault conviction. This, in turn, meant that [the] defendant could not be punished for habitual misdemeanor assault.

Id. at 635–36, 843 S.E.2d at 191.

The analysis in *Fields* guides our resolution of the case at bar. Because the factual basis for Defendant's guilty plea, as delivered by the prosecutor, supported just one assault conviction, the trial court was only authorized to enter judgment and sentence Defendant for one assault—that which provided for the greatest punishment of the three assault offenses to which Defendant pleaded guilty. *See id.* Assault inflicting serious bodily injury is a Class F felony. N.C. Gen. Stat. § 14-32.4(a). By comparison, assault by strangulation (a Class H felony), *id.* § 14-32.4(b), and assault on a female (a Class A1 misdemeanor), *id.* § 14-33(c)(2), are lesser offenses. Accordingly, Defendant could only be punished for the offense of assault inflicting serious bodily injury, and not for the other two assault offenses as well.

Conclusion

For the reasons stated herein, the trial court lacked authority to enter judgment and sentence Defendant for assault on a female and assault by strangulation where his convictions were based upon the same underlying conduct as his conviction for assault inflicting serious bodily injury. As our Supreme Court explained in *Fields*, the appropriate course of action is to arrest judgment on Defendant's convictions for assault on a female in 18 CRS 85370, and assault by strangulation in 18 CRS 85784. *Fields*, 374 N.C. at 636–37, 843 S.E.2d at 191; *see also State v. Carter*, 167 N.C. App. 582, 586, 605 S.E.2d 676, 679 (2004) (arresting judgment on one of three convictions, while affirming the remaining judgments).[3]

Because Defendant was sentenced pursuant to a modified plea arrangement, which did not consolidate the charges against him, and because we conclude that two of the judgments must be arrested, we remand to the trial court with instructions to arrest the judgments entered in 18 CRS 85370 and 18 CRS 85784, and to resentence Defendant on the remaining charges, consistent with this opinion. We affirm the remaining judgments.

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3. We reiterate that we allowed Defendant's petition for writ of certiorari for the limited purpose of addressing this sole issue; therefore, we decline to address Defendant's additional arguments.

AFFIRMED IN PART; REMANDED FOR RESENTENCING.

Judge YOUNG concurs.

Judge BERGER dissents by separate opinion.

BERGER, Judge, dissenting in separate opinion.

I respectfully dissent.

A defendant seeking a writ of certiorari from this Court "must show merit or that error was probably committed below." *State v. Killette*, 268 N.C. App. 254, 256 834 S.E.2d 696, 698 (2019) (citation and quotation marks omitted). In addition, the petitioner must also demonstrate "that the ends of justice will be [ ] promoted." *King v. Taylor*, 188 N.C. 450, 451, 124 S.E. 751, 751 (1924). Defendant here has failed to make the required showing, and I would deny certiorari.

Defendant pleaded guilty to assault on a female in violation of N.C. Gen. Stat. § 14-33(c)(2), assault inflicting serious bodily injury in violation of N.C. Gen. Stat. § 14-32.4, and assault by strangulation in violation of N.C. Gen. Stat. § 14-32.4(b). In addition, Defendant pleaded guilty to violation of a domestic violence protective order.

Defendant argues that "[t]he trial court erred when it accepted a plea and entered judgment on three assault charges because the State's factual summary and other evidence before the trial court did not establish more than one assault." However, the factual showing demonstrated that Defendant (1) grabbed the victim by her neck and choked her;[1] (2) punched the victim in the face and chest, breaking her jaw and dislodging a breast implant;[2] and (3) placed his forearm on the victim's neck causing bruising and restricting her airflow.[3] Because Defendant's separate and distinct actions are not the same conduct, I respectfully dissent.

Here, in an opinion woefully short on analysis, the majority concludes that nothing in the State's factual summary suggests there was "substantial evidence of an interruption" that would support multiple

1. Charged in 18 CRS 85370 as assault on a female pursuant to N.C. Gen. Stat. § 14-33(c)(2).

2. Charged in 18 CRS 85783 as assault inflicting serious bodily injury pursuant to N.C. Gen. Stat. § 14-32.4.

3. Charged in 18 CRS 85784 as assault by strangulation pursuant to N.C. Gen. Stat. § 14-32.4(b).

assault convictions. In reaching this result, the majority ignores binding precedent and fails to conduct an analysis under *State v. Rambert*, 341 N.C. 173, 459 S.E.2d 510 (1995).

Precedent in *State v. Dew*, 270 N.C. App. 458, 840 S.E.2d 301 (2020), which the majority fails to discuss or distinguish, sets forth the proper analysis on the issue of multiple assaults.

> "In order for a defendant to be charged with multiple counts of assault, there must be multiple assaults." *State v. McCoy*, 174 N.C. App. 105, 115, 620 S.E.2d 863, 871 (2005) (citation and quotation marks omitted). To establish that multiple assaults occurred, there must be "a distinct interruption in the original assault followed by a second assault[,] so that the subsequent assault may be deemed separate and distinct from the first." *State v. Littlejohn*, 158 N.C. App. 628, 635, 582 S.E.2d 301, 307 (2003) (*purgandum*). To determine whether Defendant's conduct was distinct, we are to consider: (1) whether each action required defendant to employ a separate thought process; (2) whether each act was distinct in time; and (3) whether each act resulted in a different outcome. *State v. Rambert*, 341 N.C. 173, 176-77, 459 S.E.2d 510, 513 (1995).
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> In *State v. Wilkes*, 225 N.C. App. 233, 736 S.E.2d 582 (2013), the defendant initially punched the victim in the face, breaking her nose, causing bruising to her face, and damaging her teeth. The victim's son entered the room where the incident occurred with a baseball bat and hit the defendant. *Id.* at 235, 736 S.E.2d at 585. The defendant was able to secure the baseball bat from the child, and he began striking the victim with it. *Id.* at 235, 736 S.E.2d at 585. The defendant's actions in the subsequent assault "crushed two of [the victim]'s fingers, broke[] bones in her forearms and her hands, and cracked her skull." *Id.* at 235, 736 S.E.2d at 585.
>
> This Court, citing our Supreme Court in *Rambert*, determined that there was not a single transaction, but rather "multiple transactions," stating, "[i]f the brief amount of thought required to pull a trigger again constitutes a separate thought process, then surely the amount of thought put into grabbing a bat from a twelve-year-old boy and then turning to use that bat in beating a woman

constitutes a separate thought process." *Wilkes*, 225 N.C. App. at 239-40, 736 S.E.2d at 587.

In *State v. Harding*, 258 N.C. App. 306, 813 S.E.2d 254, 263, *writ denied*, *review denied*, 371 N.C. 450, 817 S.E.2d 205 (2018), this Court again applied the "separate-and-distinct-act analysis" from *Rambert*, and found multiple assaults "based on different conduct." *Id.* at 317, 813 S.E.2d at 263. There, the defendant "grabb[ed the victim] by her hair, toss[ed] her down the rocky embankment, and punch[ed] her face and head multiple times." *Id.* at 317, 813 S.E.2d at 263. The defendant also pinned down the victim and strangled her with his hands. This Court determined that multiple assaults had occurred because the "assaults required different thought processes. Defendant's decisions to grab [the victim]'s hair, throw her down the embankment, and repeatedly punch her face and head required a separate thought process than his decision to pin down [the victim] while she was on the ground and strangle her throat to quiet her screaming." *Id.* at 317-18, 813 S.E.2d at 263. This Court also concluded that the assaults were distinct in time, and that the victim sustained injuries to different parts of her body because "[t]he evidence showed that [the victim] suffered two black eyes, injuries to her head, and bruises to her body, as well as pain in her neck and hoarseness in her voice from the strangulation." *Id.* at 318, 813 S.E.2d at 263.

Dew, 270 N.C. App. at 462-63, 840 S.E.2d at 304-05.

The majority on this panel once again "reaches this result without conducting a *Rambert* analysis, or discussing that decision from our Supreme Court." *State v. Prince*, 271 N.C. App. 321, 328, 843 S.E.2d 700, 705 (2020) (Berger, J., dissenting). The majority, as it did in *Prince*, relies on *State v. Williams*, 201 N.C. App. 161, 689 S.E.2d 412 (2009), which also failed to discuss *Rambert*, and *State v. McPhaul*, 256 N.C. App. 303, 808 S.E.2d 294 (2017), which involved a robbery with a baseball bat in which the victim was struck three times in succession.

At the plea hearing, the State presented the following factual basis to the court:

> Your Honor, this occurred on May the 28th, 2018. Officers responded just after midnight that morning, Your Honor, to 37 Amirite Drive, A-m-i-r-i-t-e, Drive in Candler, North

> Carolina. The caller was Ms. Leslie Wilson who is present today, Your Honor. She stated that she'd been held captive by [ ] [D]efendant for three days and there was an active [domestic violence protective order] in place.
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> When officers arrived, Ms. Wilson was present and stated that . . . [D]efendant, had grabbed her around the neck and that while he was choking her she had taken a box cutter from him. During the assault that occurred over that night, Your Honor, Ms. Wilson was punched a number of times causing a broken jaw and a dislodged breast implant. She also had small cuts on her hands that were consistent with the altercation, as well as bruising around her neck. Ms. Wilson describes that during the strangulation she was unable to breathe and felt like she was going to pass out. She had tenderness about her neck for a few days after. Additionally, she was unable to eat food properly for about six weeks after the assault due to the condition of her jaw, Your Honor. Thankfully, thanks to health insurance, she was not out-of-pocket any money for restitution which is why we're not seeking restitution in this case.

Additionally, the victim stated:

> We were both drinking and he was getting ill, so I dumped all the beer out. Dumped out everything I could find. And then I locked myself in the bathroom. And he broke two doors trying to get to me and he kept telling me to tell him where I had hid the beer. I didn't want to tell him then that I'd poured it out because I was so afraid. But I poured it out, trying to keep him from getting to this point. And then he got after me and I had a box cutter, which I was trying to defend myself at that point, and he held me down on the bed. I actually blacked out twice. And when he was strangling me and told me I needed to learn where the pressure points was, with his elbow on my jawbone and my throat. And then when I got back up I did – I had the box cutter but I was trying – I was scared to death. I thought he was going to kill me. I couldn't even hardly talk.

Based on this factual showing, the trial court could determine that Defendant (1) grabbed the victim by her neck and choked her; (2) punched the victim in the face and chest, breaking her jaw and dislodging a breast implant; and (3) placed his forearm on the victim's neck causing bruising and restricting her airflow. Properly analyzed under

Rambert, Defendant's conduct consisted of at least three separate and distinct acts.

Defendant's decisions to grab the victim by the throat, strike the victim in the face and chest, and place his forearm upon her neck each required a different thought process. *Rambert*, 341 N.C. at 176-77, 459 S.E.2d at 513; *see also Harding*, 258 N.C. App. at 317-18, 813 S.E.2d at 263 (finding that the defendant's decisions to grab the victim's hair, throw her down the embankment, and repeatedly punch her face and head required a separate thought process than his decision to pin down the victim while she was on the ground and strangle her throat to quiet her screaming).

Moreover, the assaults were distinct in time. The trial court could infer that the assaults did not, and could not, occur simultaneously. The factual showing clearly set forth that Defendant first grabbed the victim by her neck and choked her. Defendant had to cease choking the victim with his hands in order to punch the victim in the face and chest with his fists. Defendant then had to cease punching the victim in order to place his forearm on the victim's neck. Defendant could not strike the victim with both fists and still carry out the assault by strangulation. *See Dew*, 270 N.C. App. at 462-64, 840 S.E.2d at 304-05*; see also Prince*, 271 N.C. App. at 328-29, 843 S.E.2d at 705 (Berger J., dissenting) (noting that the two assaults were distinct in time because the defendant had to cease punching the victim in order to carry out the assault by strangulation).

Finally, the injuries sustained by the victim were to different body parts. *Rambert*, 341 N.C. App. at 176-77, 459 S.E.2d at 513. The injuries from the assault inflicting serious bodily injury were a broken jaw and a dislodged breast implant, while the assault by strangulation resulted in a bruised neck and the inability to eat food for six weeks. *See Harding*, 258 N.C. App. at 318, 813 S.E.2d at 263 (finding that the assaults were separate and distinct because the evidence showed that the victim sustained injuries to different parts of her body). The State was not required to prove or otherwise show that Defendant injured the victim for the assault on a female conviction. Rather, the State was only required to demonstrate that Defendant was over the age of eighteen when he committed an assault on a female victim. *See* N.C. Gen Stat. § 14-33(c)(2) (2019).

Here, the trial court could have reasonably inferred from the factual showing that Defendant committed an assault on a female pursuant to N.C. Gen Stat. § 14-33(c)(2), an assault inflicting serious bodily injury pursuant to N.C. Gen. Stat. § 14-32.4, and an assault by strangulation pursuant to N.C. Gen. Stat. § 14-32.4(b) because of Defendant's separate and distinct actions.

STATE OF NORTH CAROLINA
v.
MARVIN LEE TYSINGER, DEFENDANT

No. COA19-6

Filed 15 December 2020

1. Appeal and Error—preservation of issues—exclusion of evidence—no offer of proof—content and relevance of evidence

Even though defendant failed to make an offer of proof to preserve appellate review of evidence excluded by the trial court in his trial for multiple sexual offenses against a child, the issue was nonetheless preserved because it was obvious from the context that defendant sought to elicit testimony about the witness's *Alford* plea in order to undermine her credibility, and the plea transcript (which required the witness to testify against defendant) was an exhibit before the trial court and in the record on appeal.

2. Evidence—Rule 403—confusion of issues—Alford plea

The trial court did not abuse its discretion in a prosecution for multiple sexual offenses against a child by excluding evidence under Evidence Rule 403 that the guilty plea entered by the victim's mother—which required the mother to testify against defendant—was an *Alford* plea. Such evidence would likely have confused the issues or misled the jury.

3. Appeal and Error—preservation of issues—failure to object at trial—failure to notice appeal properly—request for two extraordinary steps to reach merits

Where defendant's oral notice of appeal of a lifetime satellite-based monitoring (SBM) order was insufficient to confer jurisdiction on the Court of Appeals and defendant also failed to argue before the trial court that imposition of SBM constituted an unreasonable search, the Court of Appeals declined to take the two extraordinary steps necessary to hear his appeal—a writ of certiorari and invocation of Appellate Rule 2—where defendant failed to identify any evidence of manifest injustice warranting such steps.

Judge MURPHY concurring in result only.

Appeal by defendant from judgments entered on or about 16 February 2018 by Judge Martin B. McGee in Superior Court, Davidson County. Heard in the Court of Appeals 12 May 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Sherri Horner Lawrence, for the State.

Glover and Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

STROUD, Judge.

Marvin Lee Tysinger (Defendant) appeals judgments convicting him of multiple sexual offenses against a child. We conclude there was no error.

I. BACKGROUND

In 2012, Davidson County DSS began an investigation into the homelife of approximately ten-year-old Isabel[1] following reports of her acting out sexually with other children. Isabel was living with her mother, in her grandparents' home. Isabel's mother had been sexually abused by Isabel's grandfather as a child as well as in her adult life. Her physical examination raised some concerns but did not show any clear physical evidence of sexual abuse, but due to the overall health concerns of the living environment, Isabel and her brother were placed outside the grandparents' home into a nearby friends' home.

In 2014, Davidson County DSS discovered Isabel and her brother had been sleeping in the bed with their grandfather. During a second physical examination, the doctor discovered changes consistent with penetrating trauma and suspected Isabel had been sexually abused. Isabel admitted to DSS she had been sexually abused by Marvin Tysinger (Defendant). Isabel stated her mother had taken her to Defendant's home and allowed him to touch her inappropriately in exchange for drugs. This abuse occurred on two occasions: first, sometime between 23 January 2011 and 22 January 2012 when Isabel was ten, and second, in September 2014, when she was thirteen.

For the first alleged incident of abuse, Defendant was charged with: (1) rape of a child by adult; (2) sexual offense with a child by an adult; and (3) indecent liberties with a child. For the second alleged incident of abuse, Defendant was charged with: (1) statutory rape of a thirteen to fifteen year-old; (2) statutory sexual offense with a thirteen to fifteen year old; and (3) indecent liberties with a child.

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1. Pseudonyms are used for all relevant persons throughout this opinion to protect the identity of the minor.

At trial, Isabel's mother testified she had been using drugs and got them from Defendant. She testified she paid for the drugs by doing household chores, having sex with Defendant, and bringing Isabel to Defendant to have sex with him. Isabel's mother further testified that she had initially lied to the DSS during its investigation of Isabel's sexual abuse to protect both Defendant and herself, but she later admitted her knowledge of what Defendant had done. She also testified she had been charged with felony child abuse and pled guilty to attempted felony child abuse in exchange for her truthful testimony at Defendant's trial.

On cross-examination of Isabel's mother, Defendant's attorney questioned her extensively regarding her plea deal. After she was asked if she "actually plead guilty," she answered, "No[,]" and the State objected and asked to be heard. The trial court excused the jury, and then heard the State's objection to further questioning regarding "new aspects of the terms of the guilty plea[,]" specifically that Isabel's mother entered an *Alford* plea.[2] The State argued that the aspects of the plea related to the meaning of an *Alford* plea are not relevant and will be confusing to the jury. The trial court heard the arguments of both sides and excluded the evidence, finding "that it is not relevant to this testimony. Rather I would find it wouldn't survive the balancing test. I think the nuances of what an *Alford* plea is, why someone would do that, as far as all that detail, I would sustain that objection." Shortly thereafter, the trial court clarified that the "sustaining of the objection is two part. First, I don't find it's relevant. And, second, to the extent it is relevant, I find it does not survive the [Rule 403] balancing test."

Defendant was found guilty on all six charges, with the trial court combining the six verdicts into four judgments: (1) rape of a child; (2) felony statutory rape of a person 13-15 years old; (3) consolidation of statutory sexual offense with a person 13-15 years old and indecent liberties with a child, and (4) consolidation of sexual offense with a child with indecent liberties with a child. Defendant was sentenced to an active sentence of 300 to 420 months for each judgment, with the four sentences to run consecutively.

Following the guilty verdicts, the trial court asked, "does anybody wish to be heard further on [sex offender registration and satellite-based

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2. "An *Alford* plea allows a defendant to 'voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.' *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167, 27 L. Ed. 2d 162, 171 (1970)." *State v. Kimble*, 141 N.C. App. 144, 145 n.2, 539 S.E.2d 342, 343 n.2 (2000).

monitoring]?" The State responded, "No, other than the premarked findings I believe the Court should find[;]"and Defendant neither objected nor commented on sex offender registration or satellite-based monitoring at any point in the proceedings. Defendant was ordered to enroll in the sex offender registry and submit to SBM for life without a hearing. Following Defendant's sentencing, he gave oral notice of appeal in open court from the judgments. Defendant has also filed a Petition for Writ of Certiorari asking this Court to consider the SBM order.

II. ANALYSIS

A. Criminal Judgments

Defendant first contends "the trial court erred by sustaining the State's objection to evidence that . . . [Isabel's] mother, would not admit guilt when she entered her guilty plea." (Original in all caps.) Isabel's mother testified on direct examination regarding the plea deal, and defendant's counsel extensively cross-examined her:

> Q. And you and Mr. Taylor talked about you pled guilty to an attempted felony child abuse, right?
>
> A. Yeah.
>
> Q. When you came before the Court you had counsel, right, an attorney?
>
> A. Yes.
>
> Q. Who helped you with the case and talked to you all about the nature of the charges against you, right?
>
> A. Yes.
>
> Q. And you were aware of the prison time exposure on that charge, right?
>
> A. Yes.
>
> Q. Thank you. And when you pled guilty to the attempted child abuse that was part of a plea deal, wasn't it?
>
> A. Yes.
>
> Q. . . . The original charge was not attempted felony child abuse, right, it was just felony child abuse, correct?
>
> A. Correct.

Q. And under our laws that was a Class D felony, does that sound right, it was a higher level felony?

A. Yes.

. . . .

Q. The charge you pled guilty to was different from the original charge in that it was a lower level offense, right?

A. Yes.

Q. You were aware that if convicted of the original charge, the minimum exposure even for a first time offender would have been no less than 38 months or three years in prison, right?

A. Yes.

Q. But pleading to the reduced charge you knew limited your exposure on a lower level felony where a sympathetic judge could give you as little as 15 months in terms of punishment, right?

A. Yes.

Q. So it greatly reduced by more than a year the time of exposure you were facing, right?

A. Yeah.

Q. And you knew that if you were convicted of the original charge that it was mandatory prison time, right?

A. Yes.

Q. And you knew that when you pled down to the lower charge there was an opportunity for a nonprison sentence or probation, right?

A. Right.

Q. So you got that benefit in exchange for your plea, right?

A. Yes.

Q. . . . You are still awaiting sentencing on that case with an understanding there is no guarantees from the DA's office, the sentencing is totally at the discretion of the sentencing judge later, right?

A. Right.

Q. The only strings attached with your plea arrangement were that you had to testify truthfully and consistently with your previous statements and your affidavit today, right?

A. Yes.

Q. If you don't do that they can pull this deal and it's voidable, right?

A. Yes.

Q. So in that sense you have an extra motivation to stick to your story, right?

A. Yes.

Q. When you went in front of the judge in this case September 14th of last year, you didn't actually plead guilty, did you?

A. No.

At this point, as noted in the Background, the State objected. After hearing from both parties, the trial court sustained the State's objection on the basis of Rules of Evidence 401 and 403. When the jury returned, the trial court gave the following instruction:

There is evidence which tends to show that a witness testified or is testifying under an agreement with the prosecutor for a charge reduction in exchange for testimony. If you find that the witness testified for this reason in whole or in part, you should examine this testimony with great care and caution. If, after doing so, you believe the testimony in whole or in part, you will treat what you believe the same as any other believable evidence.

1. Offer of Proof

[1] Before we consider Defendant's issue, we note that the State contends Defendant failed to make an offer of proof to preserve appellate review.

> This Court has previously held that to prevail on a contention that evidence was improperly excluded, either a defendant must make an offer of proof as to what the evidence would have shown or the relevance and content

of the answer must be obvious from the context of the questioning. Further,

> this Court has explained that the reason for such a rule is that the essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred. In the absence of an adequate offer of proof, we can only speculate as to what the witness' answer would have been.

State v. McCravey, 203 N.C. App. 627, 635-36, 692 S.E.2d 409, 417 (2010) (citations, quotation marks, and brackets omitted).

While it is correct that Defendant did not question Isabel's mother on *voir dire*, her plea transcript is part of the record on appeal and marked as "DEFENDANT'S EXHIBIT POST VERDICT 1[.]" Even assuming that Defendant did not admit the plea transcript at the time of the trial court's ruling on the evidence, it is in the record and was an exhibit before the trial court, and the State has stipulated and agreed to the settlement of the record.[3] Further, given the extensive line of questions and answers on cross-examination before the jury was excused from the courtroom, it is "obvious from the context of the questioning" that Defendant wished to probe the details of Isabel's mother's plea agreement even further in an attempt to undermine her credibility.[4] *Id.* The only aspect of her plea agreement not yet addressed in Isabel's mother's testimony was that it was an *Alford* plea. We thus turn to Rules 401 and 403 to consider the trial court's ruling on the evidence of Isabel's mother's plea.

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3. The State contends "[t]here is nothing in the record or counsel's arguments that even merely suggests that [Isabel's mother] understood what an *Alford* plea was and could fully explain the purpose and difference to the jury" but the plea transcript, signed by Isabel's mother, would be some evidence.

4. To the extent the State deems that "the significance of the excluded evidence" is not "obvious from the record[,]" we note "[o]ur Supreme Court has never held that a formal offer of proof is the only sufficient means to make an offer of proof: We wish to make it clear that there may be instances where a witness need not be called and questioned in order to preserve appellate review of excluded evidence. *State v. Simpson*, 314 N.C. 359, 372, 334 S.E.2d 53, 61 (1985). Rather, our Supreme Court has merely stated that a formal offer of proof is the preferred method and that the practice of making an informal offer of proof should not be encouraged, *State v. Willis*, 285 N.C. 195, 200, 204 S.E.2d 33, 36 (1974). Our Court has held that an informal offer of proof may be sufficient in certain situations to establish the essential content or substance of the excluded testimony. *State v. Walston*, 229 N.C. App. 141, 145, 747 S.E.2d 720, 724 (2013), *reversed on other grounds*, 367 N.C. 721, 766 S.E.2d 312 (2014)." *State v. Martin*, 241 N.C. App. 602, 605, 774 S.E.2d 330, 332–33 (2015) (quotation marks omitted).

2. *Alford* Plea Evidence

[2] Defendant argues the trial court erred in not allowing evidence of Isabel's mother's *Alford* plea because it was

> relevant to the question of whether the jury could accept as credible [Isabel's mother's] testimony that she actually witnessed a sexual assault on [Isabel] by . . . [Defendant] and allowed it to happen. Prior to her written statement implicating [Defendant] and her plea agreement which required her to give testimony in accord with it, [Isabel's mother] had consistently maintained that she had never seen any sexual assault on [Isabel] by [Defendant] and didn't believe he would do something like that, a claim that she was innocent of allowing her child to be sexually assaulted. If the jury had been able to hear that evidence, despite the substantial benefits of the plea terms, [Isabel's mother] was unwilling to say that she was guilty, that she was unwilling to say that she was present at sexual assault on her child and allowed it to happen, the jury could have seen this as evidence that [Isabel's mother]'s statement and testimony was the product of pressure on her from facing the risk of a mandatory three year prison sentence if convicted of the original charge.

In summary, Defendant contends evidence of the *Alford* plea would assist the jury in evaluating Isabel's mother's credibility, particularly as to her "testimony that she actually witnesses a sexual assault on [Isabel] by . . . [Defendant] and allowed it to happen" given her prior inconsistent statements regarding the matter.

a. Standard of Review

> Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the abuse of discretion standard which applies to rulings made pursuant to Rule 403.

Dunn v. Custer, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citations and quotation marks omitted). Thus, a Rule 401 review is less deferential than a Rule 403 review which considers whether "the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

b. Rules of Evidence 401 and 403

In ruling on the State's objection to evidence regarding the *Alford* plea, the trial court stated, "First, I don't find it's relevant. And, second, to the extent it is relevant, I find it does not survive the balancing test." Rule 401 provides that " '[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2010). Further, "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible." N.C. Gen. Stat. § 8C-1, Rule 402 (2010). Furthermore, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2010).

We will assume for purposes of this appeal that the evidence of Isabel's mother's *Alford* plea was relevant. But as noted by the trial court, an *Alford* plea is "nuance[d]" and a defendant may have many reasons for an *Alford* plea. Defendant's argument itself is a nuanced way of contending that Isabel's mother lied about seeing Defendant have sex with Isabel, and the evidence of this untruthfulness, according to Defendant, is the fact that she was only willing to plead guilty to an *Alford* plea; this argument requires extensive speculation on both Isabel's mother's intent in testifying and her understanding of the relevance of an *Alford* plea.[5] Further, while Defendant focuses on the difference between what he deems a standard guilty plea and an *Alford* plea, an *Alford* plea *is* a guilty plea, just as Isabel's mother testified. In *State v. Alston*, 139 N.C. App. 787, 792-93, 534 S.E.2d 666, 669-70 (2000), this Court stated:

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5. Since Defendant did not make an offer of proof of Isabel's mother's testimony regarding her own understanding or beliefs about the meaning of an *Alford* plea, the record before us does not allow us to consider this aspect of Defendant's argument.

Nonetheless, an "*Alford* plea" constitutes "a guilty plea in the same way that a plea of *nolo contendere* or no contest is a guilty plea." *State ex rel. Warren v. Schwarz*, 219 Wis.2d 615, 579 N.W.2d 698, 706 (1998); *see Alford*, 400 U.S. at 37, 91 S.Ct. at 167–68, 27 L.Ed.2d at 171 (no "material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence"); *Birdsong*, 958 P.2d at 1130 ("An *Alford* plea is to be treated as a guilty plea and a sentence may be imposed accordingly.").

As a consequence, in accepting an "*Alford* plea" as

> a concession to a defendant, the trial court accords that defendant no implications or assurances as to future revocation proceedings.

Birdsong, 958 P.2d at 1129. In other words, an "*Alford* plea" is in no way "infused with any special promises," *Warren*, 579 N.W.2d at 711, nor does acceptance thereof constitute a promise that a defendant will never have to admit his guilt[.] *[I]d.*

As the Wisconsin Supreme Court stated in *Warren*:

> [a] defendant's protestations of innocence under an *Alford* plea extend only to the plea itself.
>
> "*There is nothing inherent in the nature of an Alford plea that gives a defendant any rights, or promises any limitations, with respect to the punishment imposed after the conviction.*"
>
> Put simply, an *Alford* plea is not the saving grace for defendants who wish to maintain their complete innocence. Rather, it is a device that defendants may call upon to avoid the expense, stress and embarrassment of trial and to limit one's exposure to punishment [and it is] not the saving grace for defendants who wish to maintain their complete innocence.

Id. at 707 (citations omitted) . . . ; *see generally Smith v. Com.*, 27 Va.App. 357, 499 S.E.2d 11, 13 (1998) (quoting *State v. Howry*, 127 Idaho 94, 896 P.2d 1002, 1004 (Ct. App.1995)) (" '[A]lthough an *Alford* plea allows a defendant

> to plead guilty amid assertions of innocence, it does not require a court to accept those assertions . . . [but the court may] consider all relevant information regarding the crime, including [the] defendant's lack of remorse.' ").

Id. (alterations in original) (ellipses omitted).

Under the circumstances of this case, we agree with the trial court that evidence Isabel's mother entered an *Alford* plea would serve to confuse the jury regarding the legal details of her plea. In particular, someone would have to explain the meaning of an *Alford* plea, and Isabel's mother's own understanding of the exact meaning of an *Alford* plea may have been different that the technical legal meaning or the intent Defendant assumes she had. Defendant's counsel cross-examined Isabel's mother at length regarding her prior inconsistent statements of the sexual abuse and her guilty plea. The trial court did not abuse its discretion in excluding evidence that the plea was an *Alford* plea because this evidence in the context of this case would likely lead to "confusion of the issues, or misleading the jury[.]" N.C.G.S. § 8C-1, Rule 403. This argument is overruled.

B. Defendant's SBM Order

[3] Defendant also contends "the trial court erred by ordering that . . . [he] submit to lifetime satellite[-based] monitoring with[out] first determining that it was a reasonable search." (Original in all caps). However, appellate review of this argument is limited in two meaningful ways: (1) Defendant's oral notice of appeal is insufficient to confer jurisdiction on this Court, and (2) Defendant did not argue before the trial court that the imposition of SBM constituted an unreasonable search under the Fourth Amendment.

First, pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure, a defendant must file a written notice of appeal from an SBM order based on the civil nature of SBM proceedings. N.C. R. App. P. 3 ("Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties[.]"); *see also State v. Brooks*, 204 N.C. App. 193, 194-95, 693 S.E.2d 204, 206 (2010) (holding oral notice from SBM orders does not confer jurisdiction on this Court). Our appellate courts, however, are authorized to issue writs of certiorari "to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1). Defendant concedes that his

oral notice of appeal from the SBM order was improper under Appellate Rule 3 and requests we grant his Petition for Writ of Certiorari to enable review of the SBM order.

Second, under Rule 10 of the North Carolina Rules of Appellate Procedure, "to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). A review of the transcript shows that Defendant did not argue that the imposition of SBM constituted an unreasonable search under the Fourth Amendment. As a result, defendant has waived the ability to argue it on appeal. *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39 (2002) ("It is well settled that an error, even one of constitutional magnitude, that defendant does not bring to the trial court's attention is waived and will not be considered on appeal."). However, in contrast to the violation under Appellate Rule 3, which Defendant concedes and attempts to remedy by issuance of writ of certiorari, Defendant does not acknowledge that he violated the preservation requirement of Rule 10.

We recognize this Court has utilized Rule 2 of the North Carolina Rules of Appellate Procedure to permit a defendant to raise an unpreserved argument concerning the reasonableness of an SBM order. Under Rule 2, "[t]o prevent manifest injustice to a party. . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it . . . upon its own initiative[.]" N.C. R. App. P. 2. "Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (emphasis in original) (citation and quotation marks omitted).

Although Defendant only acknowledges one of the extraordinary steps, he "essentially asks this Court to take two extraordinary steps to reach the merits, first by issuing a writ of certiorari to hear his appeal, and then by invoking Rule 2 of the North Carolina Rules of Appellate Procedure to address his unpreserved constitutional argument." *State v. DeJesus*, 265 N.C. App. 279, 291, 827 S.E.2d 744, 753 (citation, quotation marks, and bracket omitted), *disc. review denied*, 372 N.C. 707, 830 S.E.2d 837 (2019). However, "[d]efendant fails to identify any evidence of manifest injustice warranting the invocation of Rule 2." *State v. Worley*, 268 N.C. App. 300, ___, 836 S.E.2d 278, 282 (2019), *disc. review denied*, 375 N.C. 287, ___ S.E.2d ___ (2020). As a result, we decline to

grant Defendant's Petition for Writ of Certiorari and to invoke Rule 2 to remedy this failure. We dismiss this issue for lack of jurisdiction.

III. CONCLUSION

We conclude there was no error in the trial court's judgment, and we dismiss Defendant's request to review the SBM order.

NO ERROR IN PART; DISMISSED IN PART.

Chief Judge McGEE concurs.

Judge MURPHY concurs in the result only with separate opinion.

MURPHY, Judge, concurring in result only.

Although I rely on the same facts set out in the Majority and come to the same conclusions as the Majority, my reasoning in coming to these conclusions differs and I write separately to fully set out that reasoning.

Defendant appeals the trial court's exclusion of evidence of the victim's mother taking an *Alford* plea under N.C.G.S. § 8C-1, Rule 401 ("Rule 401") and 403 ("Rule 403"). Defendant also filed a *Petition for Writ of Certiorari* requesting this court to permit review of the order entered subjecting Defendant to lifetime satellite-based monitoring ("SBM") as it was made without a reasonableness inquiry in accordance with *Grady v. North Carolina*, 575 U.S. 306, 191 L. Ed. 2d 459 (2015). The trial court erred by finding the evidence irrelevant, as the evidence had a tendency to make the events underlying the charge less likely to have occurred, as well as by conducting a Rule 403 balancing test in which the evidence being weighed was not found to be relevant. These errors were not prejudicial, as the exclusion of the evidence did not have a reasonable possibility to have changed the outcome of the trial. Due to Defendant's failure to preserve his SBM argument by raising it at trial and failure to timely appeal the SBM order in accordance with N.C. R. App. P. 3 ("Rule 3"), I would decline to grant his *Petition for Writ of Certiorari* and invoke N.C. R. App. P. 2 ("Rule 2") to remedy these failures. I would deny his *Petition for Writ of Certiorari* and dismiss the SBM issue for lack of jurisdiction.

ANALYSIS

A. Exclusion of Evidence

Defendant argues the trial court committed error by excluding evidence of the victim's mother, Mindy,[1] accepting an *Alford* plea[2] because the exclusion prevented the jury hearing that "even after agreeing to testify that she witnessed a sexual assault on [Isabel] by [Defendant] and did nothing to stop it, [Mindy] continued to maintain that she was innocent of the charge of allowing [Isabel] to be sexually assaulted by [Defendant]." Defendant argues this was

> relevant to the question of whether the jury could accept as credible [Mindy's] testimony that she actually witnessed a sexual assault on [Isabel] by [Defendant] and allowed it to happen. . . . [From which] the jury could have seen this as evidence that [Mindy's] statement and testimony was the product of pressure on her from facing the risk of a mandatory three year prison sentence if convicted of the original charge.

Defendant argues this error was prejudicial because it kept the jury from finding Mindy not credible due to the incentivized testimony, and from considering other people as perpetrators of the sexual assault. He argues this had a reasonable possibility of changing the jury's verdict.

1. Preservation of Review

To preserve appellate review of excluded evidence, a formal or informal offer of proof must be made, unless the significance of the evidence is obvious from the Record. *State v. Jacobs*, 363 N.C. 815, 818, 689 S.E.2d 859, 861 (2010). "[A] formal offer of proof is made when counsel calls the witness[] to provide [her] proposed testimon[y] at the hearing." *State v. Martin*, 241 N.C. App. 602, 605, 774 S.E.2d 330, 333 (2015) (emphasis omitted). A formal offer of proof must show the "essential content or substance" of the excluded evidence to determine whether the evidence's exclusion was prejudicial. *Currence v. Hardin*, 296 N.C. 95, 100, 249 S.E.2d 387, 390 (1978). When a party fails to make a formal

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1. Pseudonyms are used for all relevant persons throughout this opinion to protect the identity of the minor and for ease of reading.

2. An *Alford* plea is a plea entered pursuant to *North Carolina v. Alford*, which allows a defendant to be sentenced as if they had entered a guilty plea without actually admitting guilt. *North Carolina v. Alford*, 400 U.S. 25, 37, 27 L. Ed. 2d 162, 171 (1970).

offer of proof, an informal offer of proof suffices if counsel "represent[s] to the [trial] court the content of the testimon[y the] witness[] would provide." *Martin*, 241 N.C. App. at 605, 774 S.E.2d at 333. Again, the question becomes whether the "essential content or substance of the excluded testimony" is communicated to preserve the right of appeal. *State v. Walston*, 229 N.C. App. 141, 145, 747 S.E.2d 720, 724 (2013), *rev'd on other grounds*, 367 N.C. 721, 766 S.E.2d 312 (2014). Additionally, when a formal or informal offer of proof is absent, the issue can be preserved if "the significance of the evidence is obvious from the [R]ecord." *State v. Hester*, 330 N.C. 547, 555, 411 S.E.2d 610, 615 (1992) (citing *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985)). Outside of these bases of preservation, "we can only speculate as to what [a witness's testimony] would have been." *State v. Barton*, 335 N.C. 741, 749, 441 S.E.2d 306, 310-11 (1994) (alterations omitted).

Mindy was never called to provide her anticipated testimony, and as a result no formal offer of proof was ever made. However, when discussing Mindy's *Alford* plea, Defendant stated:

> It's a guilty plea with an asterisk, one in which she is clearly an interested party. She has been granted quasi immunity in exchange for her testimony. And she in one breath says I've pled guilty to this. But this case relies on an understanding of all of these nuances and all of these distinctions. And in a situation where she came before the Court and pled guilty with an asterisk pursuant to [*Alford*] in a situation where she pled guilty but didn't actually admit her guilt, I think that's absolutely relevant to the defense in this case.

Defendant's statement is insufficient as an informal offer of proof because Defendant failed to provide a "specific forecast of what the testimony would be." *Walston*, 229 N.C. App. at 145, 747 S.E.2d at 724. Instead, Defendant simply argued for its admission as relevant evidence. Defendant failed to present the purpose for the evidence and its application with any particularity, but rather only broadly asserts its inclusion was needed. *See Martin*, 241 N.C. App. at 606, 774 S.E.2d at 333 ("A 'specific forecast' would typically include the substance of the testimony[,] as opposed to merely stating what he plans to ask the witness[], the basis of the witness'[s] knowledge, the basis for the attorney's knowledge about the testimony, and the attorney's purpose in offering the evidence. The informal offer should be made with *particularity* and not be made in a summary or conclusory fashion.").

The only remaining basis for preservation is if the significance of Mindy's *Alford* plea is obvious from the Record. Before the State's objection, Defendant began to cross-examine Mindy on whether she "actually plead guilty" when she appeared before the court previously, and when arguing for the admission of this evidence Defendant made clear he intended to show "she pled guilty but didn't actually admit her guilt." In this case, it is obvious from the Record Defendant intended to elicit testimony that described Mindy's *Alford* plea. The significance of her *Alford* plea is obvious from the Record. Her *Alford* plea is contained in the Record in her *Transcript of Plea*, which required her to testify against Defendant to get the benefit of her plea. Further, Mindy's inconsistencies regarding Defendant's abuse of Isabel are contained in the Record. From these sections of the Record, it is obvious Defendant's counsel was seeking to inquire about her *Alford* plea, in which she accepted guilt for sentencing purposes without actually capitulating guilt, in order to suggest she was only testifying against Defendant for her own benefit and to cast doubt on her testimony Defendant committed these acts. Defendant could argue because she did not admit her involvement in the abuse, her claim that Defendant engaged in that same abuse is undermined. Given the obvious significance of the testimony from the Record, Defendant's challenge to the exclusion of Mindy's testimony about her *Alford* plea is preserved for review.

2. Exclusion Under Rule 401 and Rule 403

In ruling on the exclusion of the *Alford* plea, the trial court stated, "[f]irst, I don't find it's relevant. And, second, to the extent it is relevant, I find it does not survive the balancing test." First, I address the relevance determination, then the subsequent balancing test in light of the relevance determination.

> Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. . . . Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the abuse of discretion standard which applies to rulings made pursuant to Rule 403.

Dunn v. Custer, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (internal citation and marks omitted). "Abuse of discretion results where the

[trial] court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

"All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible." N.C.G.S. § 8C-1, Rule 402 ("Rule 402") (2019). " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2019). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (2019).

Even giving the trial court great deference, its finding that the evidence of Mindy's *Alford* plea was not relevant was error. Testimony related to Mindy's *Alford* plea would have shown Mindy maintained her innocence despite accepting a guilty plea. *See State v. Alston*, 139 N.C. App. 787, 792, 534 S.E.2d 666, 669 (2000) (an *Alford* plea allows a "defendant [to] enter a guilty plea while continuing to maintain his or her innocence"). By maintaining her innocence, she effectively refused to admit the events alleged actually occurred. Mindy's refusal to admit the events alleged actually occurred, which she testified Defendant participated in, has a tendency to make the existence of a fact of consequence—that Defendant actually abused Isabel—less probable than it would be without the evidence. Therefore, by definition, this evidence was relevant. Although abuse of discretion is not the standard of review here, the ruling finding the evidence not relevant is manifestly unsupported by reason, and thus would even satisfy the abuse of discretion standard. As a result, under the great deference standard of review given to Rule 401 relevancy determinations, which is less deferential than abuse of discretion, I would find this relevancy determination to be error.

The trial court proceeded to conduct a Rule 403 analysis after having found the evidence was not relevant under Rule 401. Conducting a Rule 403 analysis of evidence that is not relevant is unnecessary and improper as this evidence is inadmissible under Rule 402. N.C.G.S. § 8C-1, Rule 402 (2019). To the extent the trial court excluded the evidence based on a Rule 403 balancing test, I would find an abuse of discretion.

Despite being unnecessary, the Rule 403 balancing test here was improper as the trial court did not believe the evidence was relevant at all. Therefore, the trial court's analysis under Rule 403 evaluated whether the evidence that it assigned no relevance to was substantially outweighed by any of the Rule 403 factors. A piece of evidence assigned no relevance could never survive a Rule 403 balancing test. Accordingly, the trial court excluded the evidence. However, as explained above, the evidence is in fact relevant, making the balancing test as conducted improper. To weigh the evidence here as having no relevance is manifestly unsupported by reason, and thus is an abuse of discretion, as Mindy's denial of the events underlying her felony child abuse charge clearly makes a fact of consequence—whether or not the sexual assault by Defendant actually occurred—less likely to have occurred. To the extent the trial court excluded the evidence based on Rule 403, the trial court abused its discretion.

3. Prejudicial Error

Despite the erroneous exclusion of Mindy's testimony regarding her *Alford* plea, in order to reverse we must find the exclusion was prejudicial. "A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S § 15A-1443(a) (2019). "The exclusion of evidence constitutes reversible error only if the appellant shows that a different result would have likely ensued had the error not occurred. . . . The burden is on the appellant not only to show error, but to show *prejudicial* error . . . ." *Latta v. Rainey*, 202 N.C. App. 587, 603, 689 S.E.2d 898, 911 (2010) (internal marks and citations omitted). Here, Defendant has not shown "that a different result would have likely ensued had the error not occurred." *Id.*

Defendant argues the exclusion of evidence was prejudicial because the additional evidence would undermine Mindy's credibility and allow jurors to consider alternative perpetrators of the crimes against Isabel. However, in Mindy's testimony, she stated: she was getting a benefit for her testimony in the form of a reduced charge; initially she told DSS Defendant did not, and would not, commit the crimes charged; as a child and an adult she was sexually assaulted by her father whom she and Isabel lived with at multiple points; and Isabel had told her mother she was sexually assaulted by her mother's boyfriend at the time. Thus, the evidence otherwise introduced showed Mindy had said Defendant did not commit the crimes on multiple occasions, there were other

potential perpetrators of the crime, and she was testifying in exchange for a benefit.

Additionally, immediately after excluding the evidence of Mindy's *Alford* plea, the trial court gave an instruction addressing the benefit she was receiving in exchange for her testimony:

> There is evidence which tends to show that a witness testified or is testifying under an agreement with the prosecutor for a charge reduction in exchange for testimony. If you find that the witness testified for this reason in whole or in part, you should examine this testimony with great care and caution. If, after doing so, you believe the testimony in whole or in part, you will treat what you believe the same as any other believable evidence.

This instruction partially addressed Defendant's concerns related to the credibility of Mindy. Also, as discussed above, the other evidence presented showed there were other potential perpetrators of the crime to consider and Mindy initially denied Defendant's involvement.

In light of this, Defendant has not shown "that a different result would have likely ensued had the error not occurred." *Latta*, 202 N.C. App. at 603, 689 S.E.2d at 911. The jury considered evidence that could establish everything Defendant argues he was robbed of as a result of the trial court excluding the evidence of the *Alford* aspect of Mindy's plea. The trial court did not commit prejudicial error in excluding this evidence.

B. Defendant's SBM Order

Defendant also challenges the trial court's order subjecting him to lifetime SBM without first holding a *Grady* hearing to determine whether the order was reasonable under the Fourth Amendment. Defendant entered oral notice of appeal for his criminal judgements; however, SBM orders are civil and therefore cannot be appealed by this method. *See Brooks*, 204 N.C. App. at 194-95, 693 S.E.2d at 206 ("In light of our decisions interpreting an SBM hearing as not being a criminal trial or proceeding for purposes of appeal, we must hold that oral notice pursuant to N.C. R. App. P. 4(a)(1) is insufficient to confer jurisdiction on this Court. Instead, a defendant must give notice of appeal pursuant to N.C. R. App. P. 3(a) . . . ."). Defendant concedes he failed to properly appeal this issue under Rule 3 and requests we grant his *Petition for Writ of Certiorari* to enable review of the SBM order. Although he does not acknowledge it, Defendant also asks us to reach the merits

of this issue despite failing to preserve it due to his failure to object to it on constitutional grounds at trial. *See State v. Bishop*, 255 N.C. App. 767, 805 S.E.2d 367 (2017). To reach this issue, we would have to grant Defendant's *Petition for Writ of Certiorari* to hear the untimely appeal, as well as invoke Rule 2 to waive his failure to preserve the issue at trial. I would decline to do so.

"If this Court routinely allowed a writ of certiorari in every case in which the appellant failed to properly appeal, it would render meaningless the rules governing the time and manner of noticing appeals." *Bishop*, 255 N.C. App. at 769, 805 S.E.2d at 369. Further, "[i]t is well settled that an error, even one of constitutional magnitude, that [a] defendant does not bring to the trial court's attention is waived and will not be considered on appeal." *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39 (2002). This is equally true when applied to Fourth Amendment arguments under *Grady* as it relates to an SBM order. *Bishop*, 255 N.C. App at 769-770, 805 S.E.2d at 369-370. Further,

> Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court and only in such instances. . . . This assessment—whether a particular case is one of the rare instances appropriate for Rule 2 review—must necessarily be made in light of the specific circumstances of individual cases and parties, such as whether substantial rights of an appellant are affected. . . . In simple terms, precedent cannot create an automatic right to review via Rule 2. Instead, whether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis.

State v. Campbell, 369 N.C. 599, 603, 799 S.E.2d 600, 602-03 (2017) (internal citations, marks, emphasis, and footnote omitted). Defendant's failure to properly preserve and appeal the imposition of SBM without a *Grady* hearing is without excuse, and the facts of this case do not warrant the grant of Defendant's *Petition for Writ of Certiorari* or our invocation of Rule 2 to review this issue. "In consideration of the 'specific circumstances' of this case, *and only this case*, I reach the same result as the Majority and [would] choose [not] to [grant Defendant's *Petition for Writ of Certiorari* or] exercise our Rule 2 discretion . . . ." *State v. Ennis*, 848 S.E.2d 311 (Table), COA 19-896, 2020 WL 5902804, *11, (N.C. Ct. App. 2020) (unpublished) (Murphy, J., *concurring in part and*

concurring in result only in part). Having denied Defendant's *Petition for Writ of Certiorari*, I would dismiss this issue for lack of jurisdiction.

CONCLUSION

I would find that although the trial court erred by excluding relevant evidence concerning victim's mother's *Alford* plea under Rule 401 and Rule 403, this error was not prejudicial in this case. Additionally, due to Defendant's failure to properly preserve and appeal his SBM order, I would deny his *Petition for Writ of Certiorari*, leaving his appeal on this basis without jurisdiction.

STATE OF NORTH CAROLINA
v.
CIERA YVETTE WOODS, DEFENDANT

No. COA19-985

Filed 15 December 2020

1. Embezzlement—lawful possession of controlled substance by virtue of employment—motion to dismiss—sufficiency of the evidence

The trial court properly denied defendant's motion to dismiss the charge of embezzlement of a controlled substance by an employee of a registrant or practitioner (N.C.G.S. § 90-108(a)(14))—which defendant based on an alleged insufficiency of the evidence to show she lawfully possessed a prescription obtained by fraud—where the evidence showed defendant was a pharmacy tech for CVS pharmacy, she received an incomplete prescription for Oxycodone along with a $100 bill from an unidentified individual, she accessed the CVS patient portal and completed the prescription with another patient's information, she sent the prescription to the pharmacist to be filled, and once it was filled and placed in the waiting bin she retrieved the fraudulently filled prescription and delivered it to the unidentified individual. Because defendant was allowed to take prescriptions from the waiting bins once they were filled by the pharmacist, she had access to the fraudulently filled prescription by virtue of her employment.

2. Embezzlement—embezzlement of controlled substance by employee of registrant—motion to dismiss—sufficiency of evidence that employer is a registrant

In a trial for embezzlement of a controlled substance by an employee of a registrant (N.C.G.S. § 90-108(a)(14)) where two witnesses testified that the employer, CVS pharmacy, was a registrant with several organizations such as the State Board of Pharmacy and the DEA and was authorized to dispense medications—but did not clearly identify CVS as a registrant of the Commission of Mental Health Disabilities, and Substance Abuse Services under N.C.G.S § 90-87(25)—there was more than a scintilla of evidence which would permit a reasonable juror to conclude that CVS was an entity that was registered and authorized to distribute controlled substances. Therefore, the trial court did not err by denying defendant's motion to dismiss based upon an alleged insufficiency of the evidence to show CVS was a "registrant."

3. Embezzlement—embezzlement of a controlled substance by an employee of a registrant—failure to instruct jury on definition of registrant—plain error analysis

In a case involving embezzlement of a controlled substance by an employee of a registrant (N.C.G.S. § 90-108(a)(14)) where defendant did not request a jury instruction regarding the definition of "registrant," the trial court did not commit plain error by failing to give such an instruction. Defendant could not show any error which seriously affected the fairness, integrity, or public reputation of judicial proceedings where the instruction given by the court mirrored the statutory language of N.C.G.S. § 90-108(a)(14) and required the State to prove CVS Pharmacy was a registrant beyond a reasonable doubt, and where witness testimony provided sufficient evidence that CVS was a registrant of the State of North Carolina and was authorized to fill and deliver prescriptions.

Judge BROOK dissenting.

Appeal by defendant from judgment entered 10 May 2019 by Judge Karen Eady-Williams in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 October 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew L. Liles, for the State.

Appellate Defender Glenn Gerding, by Appellate Defender Glenn Gerding and Assistant Appellate Defender Aaron Thomas Johnson, for defendant-appellant.

BERGER, Judge.

On May 9, 2019, a Mecklenburg County jury found Ciera Yvette Woods ("Defendant") guilty of embezzlement of a controlled substance by an employee of a registrant or practitioner under N.C. Gen. Stat. § 90-108(a)(14). Defendant appeals, arguing that the trial court (1) erred when it denied Defendant's motion to dismiss because the State did not prove Defendant's actions constituted embezzlement or that CVS Pharmacy ("CVS") was a "registrant;" and (2) plainly erred when it failed to instruct the jury on the statutory definition of "registrant." We disagree.

Factual and Procedural Background

Defendant was employed as a pharmacy technician at CVS in Charlotte, North Carolina. As a pharmacy technician, Defendant was responsible for the intake of prescriptions, entry of prescriptions to create labels for medication, and ensuring that the information on the prescriptions was correct. Once Defendant verified that the prescription information was correct, the pharmacist would fill the prescription and place it in a waiting bin for Defendant to retrieve and distribute to the customer.

On April 16, 2016, Defendant was receiving patient prescriptions at the drive-thru window. During Defendant's shift, an unidentified male provided Defendant with two prescriptions – one for Oxycodone, and one for Percocet. The Percocet prescription was complete, but the Oxycodone prescription only had the "drug listed and quantity" and did not provide patient information. A $100 bill was placed in between the two prescriptions. The unidentified male asked Defendant to complete the Oxycodone prescription with another patient's information.

Defendant accepted $100.00 from the unidentified individual and then accessed CVS's "patient portal system," retrieved a different patient's information, and fraudulently filled out the incomplete Oxycodone prescription using that patient's information. The two prescriptions were filled by the pharmacist and placed in a waiting bin. Defendant retrieved the prescriptions from the bin and gave them to the unidentified individual.

That same day, a CVS pharmacist filed a report expressing her concern that a technician may be passing fraudulent prescriptions. CVS then initiated an investigation. The following day, after reviewing the security footage and the prescriptions filled the prior day, the investigators interviewed Defendant. Defendant signed a written statement

admitting that she took prescriptions from an individual in the drive-thru, and that she received $100.00 in payment to fraudulently process the two prescriptions.

Defendant was indicted on one count of embezzlement of a controlled substance by an employee of a registrant or practitioner pursuant to N.C. Gen. Stat. § 90-108(a)(14). At trial, Defendant made a motion to dismiss arguing that she did not violate N.C. Gen. Stat. § 90-108(a)(14) because she did not rightfully possess the prescriptions when she forged the patient information. Defendant also argued at trial that traditional embezzlement requires authorized possession of the diverted property. The trial court denied Defendant's motion to dismiss, and Defendant was convicted of embezzlement of a controlled substance by an employee of a registrant or practitioner under N.C. Gen. Stat. § 90-108(a)(14).

Defendant appeals, arguing that the trial court (1) erred when it denied Defendant's motion to dismiss because the State did not prove Defendant's actions constituted embezzlement or that CVS was a "registrant;" and (2) plainly erred when it failed to instruct the jury on the statutory definition of "registrant."

Analysis

I. Motion to Dismiss

"We review the trial court's denial of a motion to dismiss *de novo*." *State v. Blakney*, 233 N.C. App. 516, 518, 756 S.E.2d 844, 846 (2014) (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

> "If there is more than a scintilla of competent evidence to support the allegations in the warrant or indictment, it is the court's duty to submit the case to the jury." *State v. Horner*, 248 N.C. 342, 344-45, 103 S.E.2d 694, 696 (1958). "The terms 'more than a scintilla of evidence' and 'substantial evidence' are in reality the same and simply mean that the evidence must be existing and real, not just seeming or imaginary." *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982) (citation omitted). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Scott*, 356 N.C. 591, 597, 573 S.E.2d 866, 869 (2002) (citation omitted). "In ruling on a motion to dismiss for insufficient

> evidence, the trial court must consider the evidence in the light most favorable to the State, which is entitled to every reasonable inference which can be drawn from that evidence." *State v. Dick*, 126 N.C. App. 312, 317, 485 S.E.2d 88, 91 (1997) (citation omitted).

State v. Pabon, 273 N.C. App. 645, 651-52, 850 S.E.2d 512, 520 (2020). Further, "in borderline or close cases, our courts have consistently expressed a preference for submitting issues to the jury." *State v. Coley*, 257 N.C. App. 780, 789, 810 S.E.2d 359, 365 (2018) (*purgandum*).

A. Access

[1] Defendant contends that the evidence presented at trial did not show embezzlement because Defendant never lawfully possessed the prescriptions which were obtained through fraud. However, Defendant was not charged with embezzlement of property received by virtue of employment pursuant to N.C. Gen. Stat. § 14-90. Rather, Defendant was convicted of violating N.C. Gen. Stat. § 90-108(a)(14), which states, in relevant part:

> (a) It shall be unlawful for any person:
>
> > (14) Who is a registrant or practitioner or an employee of a registrant or practitioner and who is authorized to possess controlled substances or has access to controlled substances by virtue of employment, to embezzle or fraudulently or knowingly and willfully misapply or divert to his or her own use or other unauthorized or illegal use or to take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or divert to his or her own use or other unauthorized or illegal use any controlled substance which shall have come into his or her possession or under his or her care.

N.C. Gen. Stat. § 90-108(a)(14) (2019).

"[T]his Court's duty is to carry out the intent of the legislature. As a cardinal principle of statutory interpretation, if the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." *State v. Reaves-Smith*, 271 N.C. App. 337, 343, 844 S.E.2d 19, 24 (2020) (citation omitted).

By its plain language, N.C. Gen. Stat. § 90-108(a)(14) makes it unlawful for an employee who is "authorized to possess controlled substances"

or who has "access to controlled substances by virtue of their employment," to misapply or divert a controlled substance for an unauthorized or illegal use. N.C. Gen. Stat. § 90-108(a)(14). *See State v. Moraitis*, 141 N.C. App. 538, 541, 540 S.E.2d 756, 757-58 (2000) ("A statute that is clear on its face must be enforced as written . . . [w]e presume that the use of a word in a statute is not superfluous and must be accorded meaning, if possible" (citation and quotation marks omitted)). Accordingly, because N.C. Gen. Stat. § 90-108(a)(14) has two clauses connected by the disjunctive "or," the State had the burden of proving Defendant was either "authorized to possess controlled substances" or had "access to them by virtue her employment." *See State v. Conway*, 194 N.C. App. 73, 77-78, 669 S.E.2d 40, 43 (2008) ("[W]here a statute contains two clauses which prescribe its applicability, and the clauses are connected by a disjunctive (e.g. 'or'), the application of the statute is not limited to cases falling within both clauses, but will apply to cases falling within either of them." (citation and quotation marks omitted)).

At trial, Dr. Lauren Kaskie, a CVS pharmacist, testified that when a prescription was dropped off at the pharmacy, the pharmacy technician had "access to patient portals" which included patient information, and would "go to [the] computer system, . . . to generate a label." Once a label is generated, the prescription is then filled by the pharmacist and placed in a "waiting bin" where the pharmacy technician would then "walk to the waiting bin to retrieve" the prescription for the customer. Dr. Kaskie further testified that pharmacy technicians cannot count or fill Schedule II prescriptions, including Oxycodone and Percocet, but "they are entrusted with handing prescriptions to the appropriate customer."

Here, after Defendant received the incomplete Oxycodone prescription, she accessed the CVS patient portal system and completed the prescription with a different patient's information. Defendant then sent the prescription to the pharmacist to be filled. After being placed in the waiting bin, Defendant took the fraudulently filled prescription and delivered it to the unidentified individual. Accordingly, Defendant had "access to [the prescriptions] by virtue of her employment" because she was allowed to take prescriptions from the waiting bins once they were filled by the pharmacist. Therefore, the trial court did not err in denying her motion to dismiss.

B. Registrant

[2] Defendant next argues that the State failed to present evidence that CVS was a "registrant" under N.C. Gen. Stat. § 90-87(25). " 'Registrant' means [any legal entity] registered by the [Commission for Mental

Health, Developmental Disabilities, and Substance Abuse Services] to manufacture, distribute, or dispense any controlled substance as required by this Article." N.C. Gen. Stat. § 90-87(3a), (20), (25) (2019).

At trial, two witnesses testified that CVS was a "registrant." During the State's direct examination of Dr. Kaskie, the following colloquy occurred:

> [THE STATE]: Is CVS Pharmacy, Incorporated, a registrant of any boards or commissions?
>
> [DR. KASKIE]: Yes.
>
> [THE STATE]: And do you know which?
>
> [DR. KASKIE]: They register with both the State, so the North Carolina Board of Pharmacy, and also the DEA.
>
> [THE STATE]: And what does that mean that they are a registrant of any of these boards or commissions?
>
> [DR. KASKIE]: Those boards are responsible for making sure that things are in check, such as the amounts and limits of certain medications and substances that are dispensed through the course of time. They make sure those things are not in excess.
>
> [THE STATE]: Does that registration with those boards and the DEA enable or authorize CVS to dispense prescription medication?
>
> [DR. KASKIE]: Yes, they do.

Further, during the State's direct examination of Ms. Yolanda Smith, a CVS pharmacy technician, the following exchange occurred:

> [THE STATE]: And do you know whether CVS is a registrant that is authorized by law to dispense medications?
>
> [SMITH]: Yes, ma'am.

Although the testimony presented at trial did not clearly identify CVS as a "registrant" of the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services under N.C. Gen. Stat. § 90-87(25), when taken as a whole and in the light most favorable to the State, there was "more than a scintilla of competent evidence" which would permit a reasonable juror to conclude that CVS is an entity that is registered and authorized to distribute or dispense controlled substances. *See State v. Johnson*, No. COA16-509, 2016 WL 7100632, at *7 (N.C. Ct. App. Dec. 6, 2016) (unpublished) (finding the VA a practitioner

because sufficient evidence was presented tending to show the VA was a federally funded hospital capable of dispensing or administering controlled substances).

Accordingly, when viewed in the light most favorable to the State, there was more than a scintilla of competent evidence which "permits a reasonable inference that Defendant" committed embezzlement of a controlled substance by an employee of a registrant or practitioner pursuant to N.C. Gen. Stat. § 90-108(a)(14). Therefore, the trial court did not err in denying Defendant's motion to dismiss.

II. Jury Instructions

[3] Defendant concedes that she failed to object to the jury instructions and that she did not request an instruction on the statutory definition of "registrant." However, Defendant argues that the trial court committed plain error by not instructing the jury on the statutory definition of "registrant." We disagree.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice – that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

Reaves-Smith, 271 N.C. App. at 346-47, 844 S.E.2d at 26 (quoting *State v. Lawrence*, 365 N.C. 506, 516-17, 723 S.E.2d 326, 334 (2012)).

"In instructing the jury, it is well settled that the trial court has the duty to declare and explain the law arising on the evidence relating to each substantial feature of the case." *Id.* at 347, 844 S.E.2d at 26 (citation and quotation marks omitted). "[I]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Lawrence*, 365 N.C. at 517, 723 S.E.2d at 333 (citation and quotation marks omitted).

Here, the trial court instructed the jury on embezzlement of a controlled substance by an employee of a registrant or practitioner as follows:

> The defendant has been charged with embezzlement of a controlled substance by an employee of a registrant

> or a practitioner, which occurs when an employee of a registrant, CVS Pharmacy, Incorporated, which is an entity capable of owning property, intentionally, fraudulently and dishonestly misapplies or diverts a Schedule II controlled substance to an unauthorized or illegal use.
>
> For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt. First, that the defendant was an employee of a registrant, CVS Pharmacy, Incorporated, an entity capable of owning property. . . .

Even if we assume the trial court erred in its instruction to the jury, Defendant has failed to show that the "error had a probable impact on the jury's finding that the defendant was guilty." *Reaves-Smith*, 271 N.C. App. at 346-47, 844 S.E.2d at 26 (citation omitted). In fact, the trial court's instruction mirrored the statutory language of N.C. Gen. Stat. § 90-108(a)(14). Specifically, the instruction provided that the State must prove CVS was a "registrant" beyond a reasonable doubt. Further, the testimony of Dr. Kaskie and Ms. Smith provided sufficient evidence that CVS was a registrant of the State of North Carolina and was authorized to fill and deliver prescriptions. Thus, Defendant cannot show that the trial court's alleged error prejudiced Defendant. Moreover, Defendant has failed to demonstrate that this is the exceptional case in which the purported error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* at 347, 844 S.E.2d at 26 (quoting *Lawrence*, 365 N.C. at 516-17, 723 S.E.2d at 334). Accordingly, Defendant's argument is overruled.

Conclusion

For the reasons stated herein, the trial court did not err when it denied Defendant's motion to dismiss, and Defendant has failed to demonstrate plain error in trial court's instructions to the jury.

NO ERROR.

Judge ZACHARY concurs.

Judge BROOK dissents in separate opinion.

BROOK, Judge, dissenting.

I respectfully dissent. Because I would conclude that there was insufficient evidence that Defendant embezzled oxycodone under N.C.

Gen. Stat. § 90-108(a)(14), as the State charged, I would hold the trial court erred in denying Defendant's motion to dismiss for insufficient evidence and reverse Defendant's conviction.

I. Background

A. Factual Background

On 16 April 2016, Defendant worked as a pharmacy technician at CVS pharmacy located at 5100 Beatties Ford Road in Charlotte, North Carolina. As a pharmacy technician, Defendant received and counted prescriptions, performed data entry, and assisted the pharmacist with other requests.

On that date, Defendant volunteered to work at the drive-through window at CVS. An unidentified man drove to the drive-through window, handed Defendant two prescriptions, both for oxycodone, a Schedule II medication, and a $100 bill. One prescription was filled out in the name of Pamela Crowe, but the other was incomplete except for the medication and dosage. The unidentified man asked Defendant to complete the blank prescription with another patient's information, William Thompson, and provided her with a date of birth. Defendant retrieved information regarding a customer in the CVS database named William Thompson and filled out the remainder of the prescription with that information. Defendant then initiated the process of filling the prescriptions. The man who provided Defendant with the prescriptions and the $100 bill later returned to the drive-through to pick up the medications. She provided the unknown man with at least one and up to six prescriptions in this manner. Defendant later admitted to retrieving information regarding Pamela Crow in the CVS database and entering her information on a prescription as well.

At trial, the pharmacist who worked at that CVS location, Dr. Lauren Kaskie, testified regarding the process of filling a prescription. She testified that, upon receiving a written prescription from the patient, the pharmacy technician examines the prescription to ensure it includes (1) the patient's name, (2) the name of the medication, and (3) the prescribing doctor's signature. Then the technician enters the information from that prescription into the computer system to generate a label and bill the insurance company.

Dr. Kaskie also testified that different types of medications are classified according to the legal limitations on their prescription. She testified that "CI" or Class I medications "are illegal drugs in this country." "CII" or Class II medications, in contrast, can be obtained via a prescription but "are the second highest class of controlled substance

[with] the most potential for abuse and misuse and are a lot of times [obtained] illegally because of potential street value." Class III, IV, and V medications "have much less of a chance [for abuse and misuse] as you step down the ranks[.]" The process for filling a prescription differs depending on the classification level of the medication. When a customer presents with a prescription for a CIII, IV, or V medication, the pharmacy technician "retrieve[s] the medication from the shelf, count[s] it out, and pass[es] it to the pharmacist for final verification." However, pharmacy technicians do not have the authority to fill prescriptions for CII drugs. Dr. Kaskie testified that "in the case of a CII controlled substance, they print the label and then send it to the pharmacist who is the only person allowed to handle the CII narcotics." The pharmacist retrieves the CII medication from a locked safe and fills the prescription, and only the pharmacist possesses the code to enter the safe containing CII medications.

After a pharmacist has counted the pills for a CII medication prescription and placed the pills in a bottle, the pharmacist places the bottle in a bag, the bag is stapled shut with a prescription label, and the bagged medication is placed in a waiting bin. When a patient returns to collect the CII prescription, the technician requests the patient's name, date of birth, and identification, and then may hand the packaged medication to the patient.

Dr. Kaskie testified that she began to suspect illegal activity on 16 April 2016 when she noticed the CII prescriptions coming into the pharmacy were for high doses, and that they were in the names of regular customers whom she did not know to be prescribed controlled substances. She also noticed that one of the prescriptions was not billed to insurance, which she "considered a red flag for controlled substances." When she noticed she had seen the same doctor's name on three or four prescriptions for controlled substances throughout the day, she "became suspicious of the legitimacy of the prescriptions" and ceased to fill them. Defendant ultimately admitted to this conduct and that her conduct violated CVS policy.

B. Procedural History

A Mecklenburg County grand jury indicted Defendant by a superseding indictment on 2 April 2018 for "embezzlement of a controlled substance by employee of a registrant or practioner [sic]" under N.C. Gen. Stat. § 90-108(a)(14). The indictment reads as follows:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 16th day of April, 2016,

> in Mecklenburg County, [Defendant] unlawfully, willfully and feloniously did as an employee of a registrant, CVS Heath [sic] Corp., a corporation, doing business as CVS Pharmacy, a legal entity capable of owning property, and who had access to controlled substances by virtue of her employment, embezzle and fraudulently, knowingly, and willfully misapply and divert to an unauthorized or illegal use, Oxycodone . . . in that the defendant accessed the patient profile system to obtain and enter biographical information of a patient on to a prescription that lacked patient information. The defendant then filled the prescription in return for $100.00 which the defendant used for personal use. At the time the defendant . . . was the agent and employee of CVS Heath [sic] and in that capacity had been entrusted to receive the property described above and in that capacity the defendant did receive and take into her care and possession that property.

Defendant was tried at the 6 May 2019 Criminal Session of the Superior Court in Mecklenburg County before the Honorable Karen Eady-Williams. At the close of the State's evidence, Defendant made global motions to dismiss based on insufficient evidence and fatal variances between the allegations in the indictment and the evidence presented at trial. She renewed these motions after declining to present evidence for the defense.

The jury found Defendant guilty of "embezzlement of a controlled substance by an employee" on 10 May 2019. The trial court entered judgment on the jury's verdict and sentenced her to eight to nineteen months of active imprisonment, suspended for 18 months of supervised probation. Defendant entered notice of appeal in open court.

II. Standard of Review

"The denial of a motion to dismiss for insufficient evidence is a question of law[ ] which this Court reviews *de novo*[.]" *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (internal citations omitted). "Under a *de novo* review, th[is C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal marks and citation omitted).

III. Analysis

I agree with the majority that Defendant's conduct falls within the broad reach of N.C. Gen. Stat. § 90-108(a)(14) because the evidence at

trial established that she had "access to controlled substances by virtue of [her] employment" and that she "fraudulently or knowingly and willfully misappl[ied] or divert[ed] to . . . her own use or other unauthorized or illegal use" oxycodone. N.C. Gen. Stat. § 90-108(a)(14) (2019).

However, the State did not charge her with *only* having misapplied or diverted the oxycodone; the State charged her with having "embezzle[d] *and* fraudulently, knowingly, and willfully misappl[ied] and divert[ed] to an unauthorized or illegal use, Oxycodone[.]" (Emphasis added.) In other words, whereas the statute at issue requires that a defendant have "embezzle[d] *or* fraudulently or knowingly and willfully misappl[ied] or divert[ed]" a controlled substance, *id.* (emphasis added), the State took it upon itself to charge Defendant with having both embezzled *and* misapplied or diverted oxycodone. And because the State did not establish that Defendant both diverted the oxycodone *and* that she embezzled it, I respectfully dissent.

In reviewing a motion to dismiss for insufficient evidence, the trial court must determine

> whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator. Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion. In deciding whether substantial evidence exists[, t]he evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

State v. Hill, 365 N.C. 273, 275, 715 S.E.2d 841, 842-43 (2011) (internal marks and citations omitted).

Additionally, "[t]he Due Process Clause of the United States Constitution requires that the sufficiency of the evidence to support a conviction be reviewed with respect to the theory of guilt upon which the jury was instructed." *State v. Wilson*, 345 N.C. 119, 123, 478 S.E.2d 507, 510 (1996) (citing *Presnell v. Georgia*, 439 U.S. 14, 16, 99 S. Ct. 235, 236-37, 58 L. Ed. 2d 207, 211 (1978)). Indeed, "[i]t is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the

bill of indictment. The allegation and proof must correspond." *State v. Jackson*, 218 N.C. 373, 376, 11 S.E.2d 149, 151 (1940). Where there is "[a] variance between the criminal offense charged and the offense established by the evidence[,]" the State has "in essence [ ] fail[ed] . . . to establish the offense charged." *State v. Waddell*, 279 N.C. 442, 445, 183 S.E.2d 644, 646 (1971). A motion to dismiss based on a fatal variance

> is based on the assertion, not that there is no proof of a crime having been committed, but that there is none which tends to prove that the particular offense charged in the bill has been committed. In other words, the proof does not fit the allegation, and therefore leaves the latter without any evidence to sustain it. It challenges the right of the State to a verdict upon its own showing, and asks that the court, without submitting the case to the jury, decide, as matter of law, that the state has failed in its proof.

State v. Law, 227 N.C. 103, 104, 40 S.E.2d 699, 700 (1946) (citation omitted).

Particularly pertinent to the case in controversy, in *State v. Campbell*, 257 N.C. App. 739, 810 S.E.2d 803 (2018), *aff'd as modified*, 373 N.C. 216, 835 S.E.2d 844 (2019), our Court held that an indictment charging the defendant with larceny of property belonging to a pastor and a church fatally varied from the evidence adduced at trial, which tended to show that only the church owned the property. 257 N.C. App. at 766, 810 S.E.2d at 819.

The key question in this appeal is whether the conduct proved by the State supports the conduct charged by the indictment. Defendant was charged by indictment under N.C. Gen. Stat. § 90-108(a)(14) for "embezzlement of a controlled substance by employee of a registrant or practioner [sic]." The relevant portions of the indictment state, "[Defendant] unlawfully, willfully and feloniously did as an employee of a registrant, . . . CVS Pharmacy, . . . and who had access to controlled substances by virtue of her employment, embezzle and fraudulently, knowingly, and willfully misapply and divert to an unauthorized or illegal use, Oxycodone." Therefore, in order to survive a motion to dismiss, the State must have offered sufficient evidence to prove that Defendant (1) had access to controlled substances by virtue of her employment; that she (2) unlawfully, willfully and feloniously embezzled oxycodone; and that she (3) fraudulently, knowingly, and willfully misapplied and diverted oxycodone to an unauthorized or illegal use. *See Jackson*, 218 N.C. at 376, 11 S.E.2d at 151 ("It is a rule of universal observance in the

administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment. The allegation and proof must correspond."). Defendant does not dispute that the State offered sufficient evidence of elements (1) and (3) above. Instead, she argues that her motion to dismiss should have been granted because the State charged her with having embezzled the oxycodone but failed to introduce any evidence of embezzlement, only of fraudulent, willful, or knowing misapplication or diversion.

Determining whether the State offered sufficient evidence of embezzlement thus turns on what that term means in the statute at issue. The State argues that "to embezzle" under § 90-108(a)(14) means something different than our appellate courts have interpreted it to mean in the context of § 14-90, the "traditional" embezzlement statute. The State argues that § 90-108(a)(14)

> is clearly worded in the disjunctive to cover both employees with authorized possession and employees like defendant with mere access. . . . The fact that the General Assembly chose to include not only employees with authorized possession but those with mere access within N.C. Gen. Stat. § 90-108(a)(14) is clear intent to broaden its application beyond that of traditional embezzlement.

Defendant contends that § 90-108(a)(14), "as written, appears to create *multiple* offenses, one of which is embezzlement[,]" and that our case law's "traditional" definition of embezzlement applies to § 90-108(a)(14).

In statutory interpretation, "[t]he beginning point is the relevant statutory text." *United States v. Quality Stores, Inc.*, 572 U.S. 141, 145, 134 S. Ct. 1395, 1399, 188 L. Ed. 2d 413, 419 (2014). The relevant language of N.C. Gen. Stat. § 90-108(a) is as follows:

> It shall be unlawful for any person . . . [w]ho is . . . an employee of a registrant or practitioner and who is authorized to possess controlled substances or has access to controlled substances by virtue of employment, to embezzle or fraudulently or knowingly and willfully misapply or divert to his or her own use or other unauthorized or illegal use or to take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or divert to his or her own use or other unauthorized or illegal use any controlled substance which shall have come into his or her possession or under his or her care.

N.C. Gen. Stat. § 90-108(a)(14) (2019). In determining the plain meaning of a statute, "we give every word of the statute effect, presuming that the legislature carefully chose each word used." *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009).

Moreover, the prior construction canon applies here, and it states that "when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute is presumed to incorporate that interpretation." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 330, 135 S. Ct. 1378, 1386, 191 L. Ed. 2d 471, 480 (2015) (internal marks and citation omitted). Relatedly, "it is always presumed that the Legislature acted with full knowledge of prior and existing law." *Ridge Cmty. Inv'rs, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977). "Where the text permits[,]" the Legislature's "enactments should be construed to be consistent with one another." *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 108, 130 S. Ct. 2433, 2447, 177 L. Ed. 2d 424, 442 (2010).

Applying the above rules of statutory interpretation makes plain Defendant's conduct does not constitute embezzlement pursuant to § 90-108(a)(14).

The majority opinion does not address the State's argument that Defendant's conduct constitutes embezzlement in this context and instead concludes that Defendant's motion to dismiss was properly denied because the State proved that Defendant had "access to [controlled substances] by virtue of her employment" and that she misapplied or diverted a controlled substance for an unauthorized or illegal use. This reasoning ignores the fact that the State charged Defendant with embezzlement. In so doing, the majority implicitly reads the statute's "to embezzle" as covering the same conduct as to "fraudulently or knowingly and willfully misapply or divert to his or her own use or other unauthorized or illegal use[.]" N.C. Gen. Stat. § 90-108(a)(14) (2019). But this impermissibly renders the "to embezzle" language superfluous in contravention of the requirement that we give each word in the statute meaning. *See N.C. Dep't of Corr.*, 363 N.C. at 201, 675 S.E.2d at 649.

The State's argument, that the language of § 90-108(a)(14) changes the meaning of "to embezzle," presents a somewhat closer question than the interpretation put forward by the majority[1] but must meet a similar fate. Returning to the pertinent portions of the statutory text, it merits its mention that the statute's provisions describe *to whom* the statute

1. Tellingly, the State does not make the argument adopted by the majority.

applies and *what* conduct it covers. The who: "any person . . . who is authorized to possess controlled substances or has access to controlled substances by virtue of employment[.]" N.C. Gen. Stat. § 90-108(a)(14) (2019). The what: "to embezzle or fraudulently or knowingly and willfully misapply or divert to his own use or other unauthorized or illegal use[.]" *Id*. As Defendant notes in her brief, "[t]he statute, as written, appears to create *multiple* offenses, one of which is embezzlement." It also criminalizes, for example, secreting controlled substances with the intent to take them later, as well as "tak[ing or] mak[ing] away with . . . any controlled substance[.]" *Id.* As noted above, however, the State must establish embezzlement *and* fraudulent or knowing misapplication or diversion when it charges both offenses. The crux of the State's argument is that the "who" language—including those with "access" under the broad reach of the statute—changes the meaning of the "what" language—"embezzle[ment]."

Our courts have long settled the meaning of embezzlement, including in interpreting § 14-90(b), the pertinent language of which also appears in § 90-108(a)(14). Section 14-90(b) reads in relevant part as follows:

> Any person who shall: (1) **Embezzle or fraudulently or knowingly and willfully misapply or convert to his own use**, or (2) Take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or convert to his own use, any money, goods or other chattels, . . . shall be guilty of a felony.

N.C. Gen. Stat. § 14-90 (2019) (emphasis added). Nearly identically, § 90-108(a)(14) states in relevant part that it is unlawful for any person who is an employee of a registrant or practitioner and has access to controlled substances

> **to embezzle or fraudulently or knowingly and willfully misapply or divert to his or her own use** or other unauthorized or illegal use or to take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or divert to his or her own use or other unauthorized or illegal use any controlled substance[.]

Id. § 90-108(a)(14) (emphasis added). Because the relevant language regarding what conduct the statutes proscribe is identical, we turn to our case law interpreting "embezzle" under § 14-90 for guidance regarding the term's meaning in § 90-108(a)(14). A review of this case law

seriously undermines the State's argument as our appellate courts have long drawn a distinction between mere access to property and the rightful possession that is a necessary component of embezzlement.

In *State v. Weaver*, 359 N.C. 246, 607 S.E.2d 599 (2005), our Supreme Court addressed the issue of whether the defendant committed embezzlement when she, an administrative employee, "took a corporate signature stamp without permission and wrote unauthorized corporate checks, thereby misappropriating funds from her employer." *Id.* at 247, 607 S.E.2d at 599. Because "the employee did not lawfully possess or control the misappropriated funds[,]" the Supreme Court concluded that the State did not satisfy "the lawful possession or control element of the crime of embezzlement" and affirmed the decision of the Court of Appeals which reversed the defendant's convictions. *Id.* The Supreme Court considered that the defendant did not have authority to use her employer's signature stamp or to write checks from the business's accounts without the express authorization of her employer on a case-by-case basis. *Id.* at 256, 607 S.E.2d at 605. First, the Court noted that "[h]istorically, since the General Assembly codified the criminal offense of embezzlement in North Carolina, the criminal act has hinged on a defendant's misappropriation of property in his/her lawful possession or care due to employment or fiduciary capacity." *Id.* Interpreting the defendant's conduct in the context of the embezzlement statute, the Supreme Court concluded as follows:

> While [the defendant] had *access* to the checks and signature stamp by virtue of her status as an employee at R&D and International Color, we cannot say, based on these facts, that [the defendant]'s possession of this property was *lawful*[,] nor are we persuaded that this property was under [the defendant]'s care and control as required by N.C.G.S. § 14-90. Because [the defendant] never lawfully "possessed" the misappropriated funds and because the funds were not "under her care" we conclude that [the defendant] did not commit the crime of embezzlement as defined in N.C.G.S. § 14-90.

Id. (alterations omitted). In short, despite the fact that the defendant had access to the funds, "[b]ecause her possession [of the misappropriated funds], if any, was not lawful, the crime of embezzlement has not occurred." *Id.* at 259, 607 S.E.2d at 607 (citing *State v. Speckman*, 326 N.C. 576, 578, 391 S.E.2d 165, 166 (1990) ("This Court has held that to constitute embezzlement, the property in question initially must be acquired lawfully, pursuant to a trust relationship, and then wrongfully converted.")).

Where a defendant obtains property "by a trick or fraudulent device[,]" and where it is "only by this trick or fraudulent device that the taking was accomplished," he is not guilty of embezzlement but of obtaining property by false pretenses or "larceny by trick." *State v. Griffin*, 239 N.C. 41, 45, 79 S.E.2d 230, 233 (1953); *see also State v. Keyes*, 64 N.C. App. 529, 532, 307 S.E.2d 820, 822-23 (1983) ("There is a difference between having *access* to property and possessing property in a fiduciary capacity. Embezzlement is the fraudulent conversion of property by one who has *lawfully* acquired possession of it for the use and benefit of the owner, i.e., in a fiduciary capacity. Larceny is the fraudulent conversion of property by one who has acquired possession of it by trespass.") (emphasis added). In contrast to embezzlement, "to constitute false pretenses the property must be acquired unlawfully at the outset, pursuant to a false representation." *Speckman*, 326 N.C. at 578, 391 S.E.2d at 166. "The fact that a defendant is an employee of a business does not change theft of goods from larceny to embezzlement if the defendant never had lawful possession of the property." *Keyes*, 64 N.C. App. at 532, 307 S.E.2d at 823.

This case law makes three things plain, each of which calls the State's argument here further and further into doubt. First, there is a settled meaning of embezzlement in our case law, creating a presumption that it is used in the same sense in § 90-108(a)(14). *See Armstrong*, 575 U.S. at 330, 135 S. Ct. at 1386. Second, that settled meaning centers around misappropriation of something lawfully possessed. *Weaver*, 359 N.C. at 247, 607 S.E.2d at 599. Third, access to property does not determine whether it is lawfully possessed. *Id.*

Moreover, and echoing the central failing of the majority opinion, adopting the State's capacious interpretation of embezzlement in this context renders the "fraudulently . . . misapply" language that follows it superfluous. Put another way, if "to embezzle" is unmoored from lawful possession as the State suggests, the statute need not also prohibit fraudulent misapplication.

All this being said, I think the best reading of § 90-108(a)(14) is that it uses the concept of embezzlement in the traditional sense and, as a consequence, the State cannot prevail here. Though the State referred to Defendant's conduct as "embezzlement" in the indictment, in its opening statement, in its closing argument, and in the jury instructions, Defendant did not embezzle oxycodone because she did not obtain it lawfully. Instead, she obtained it by "trick or fraudulent device[,]" i.e., fraudulent prescriptions. *Griffin*, 239 N.C. at 45, 79 S.E.2d at 233. Dr. Kaskie testified that "the filling of that prescription was done . . .

fraudulently," and that "if [she] had known that this was a fraudulent prescription, the drugs would never have been filled[.]" The CVS loss prevention manager testified that "CVS policy and rules [do not] allow for a pharmacy technician to have access to Schedule II drugs" and that, but for the "fraudulent prescriptions," "those drugs would not [have] exit[ed] the safe[.]" This case is thus similar to *Weaver*, in which the defendant "took a corporate signature stamp without permission and wrote unauthorized corporate checks, thereby misappropriating funds from her employer." 359 N.C. at 247, 607 S.E.2d at 599. Here, Defendant took patient information from the patient portal without permission and wrote unauthorized and fraudulent prescriptions, thereby misappropriating oxycodone from her employer. Just as our Supreme Court concluded in *Weaver*, that conduct cannot constitute embezzlement. *Id.* at 256, 607 S.E.2d at 605.

The State took it upon itself to prove embezzlement, a burden it could not bear in the current controversy. Accordingly, I would conclude that Defendant's motion to dismiss for insufficient evidence was improperly denied.

IV. Conclusion

Because I would reverse Defendant's conviction for embezzlement, I would not reach the additional issues, namely whether the State proved CVS is a "registrant" as defined by N.C. Gen. Stat. § 90-108(a)(14) or whether the trial court erred by failing to instruct the jury on the statutory definition of the term "registrant."

THE UMSTEAD COALITION, RANDAL L. DUNN, JR., TAMARA GRANT DUNN, WILLIAM DOUCETTE, AND TORC (A/K/A TRIANGLE OFF-ROAD CYCLISTS), PLAINTIFFS
v.
RALEIGH-DURHAM AIRPORT AUTHORITY AND WAKE STONE CORPORATION, DEFENDANTS

No. COA20-129

Filed 15 December 2020

1. Appeal and Error—interlocutory appeal—counterclaim pending—motion to take judicial notice of voluntary dismissal—improper method

In an action challenging an airport authority's decision to lease land for a gravel mine, the Court of Appeals denied plaintiffs' motion to take judicial notice of a voluntary dismissal of a counterclaim—which, once dismissed, rendered an otherwise interlocutory order immediately appealable—because the proper method to bring the dismissal to the appellate court's attention was to make a motion to amend the record on appeal.

2. Appeal and Error—record on appeal—amended on appellate court's own motion—Appellate Procedure Rule 9

In an action challenging an airport authority's decision to lease land for a gravel mine, the Court of Appeals opted to amend the record on appeal pursuant to Appellate Procedure Rule 9(b)(5)b to include a voluntary dismissal of a counterclaim, the dismissal of which rendered an otherwise interlocutory order immediately appealable, and dismissed plaintiffs' petition for writ of certiorari as moot.

3. Constitutional Law—standing—violation of Open Meetings Law—any person may initiate suit

In an action challenging an airport authority's decision to lease land for a gravel mine, all plaintiffs (including adjacent property owners, a cyclist organization, and a nonprofit corporation dedicated to preserving a nearby park) had standing to bring claims against the airport authority alleging it violated the Open Meetings Law (N.C.G.S. § 143-318.9 et seq.) when it voted for the lease in a public meeting, because the statutory language gives "[a]ny person" the right to bring an action based on a violation of that law without the need to demonstrate special damages.

4. Constitutional Law—standing—challenge to validity of land lease—special damages

In an action challenging an airport authority's decision to lease land for a gravel mine, only the adjacent property owners had standing to challenge the validity of the lease, and not the remaining plaintiffs (including a cyclist organization and a nonprofit corporation dedicated to preserving a nearby park), where the neighboring landowners presented uncontroverted evidence that the mine's operation would cause them to suffer special damages, including reduced enjoyment of their property and diminished property value.

5. Statutes—lease by airport authority—N.C.G.S. § 63-56(f)—N.C.G.S. § 160A-272—applicability

In an action challenging an airport authority's decision to lease land for a gravel mine, the trial court properly determined that the airport authority's decision was not subject to the requirements or limitations contained in N.C.G.S. § 63-56 (governing jointly operated municipal airports) or N.C.G.S. § 160A-272 (governing municipal leasing procedures) where the airport authority was established by a public-local law prior to the enactment of those statutes, and the legislature gave no indication, either expressly or by implication, that it intended for those statutes to repeal any part of the airport authority's charter. Further, section 160A-272 did not apply to the airport authority since it is not a "city" as defined by Chapter 160A.

6. Cities and Towns—enabling statute—delegation of legislative authority—airport authority's charter—scope of powers

In an action challenging an airport authority's decision to lease land for a gravel mine, the trial court properly concluded the airport authority's board operated within the scope of its powers granted by the enabling statute (charter), which unambiguously gave the airport authority the power to lease, without joining the Governing Bodies (the cities of Raleigh and Durham, and Wake and Durham Counties), any property under its administration, and to enter into transactions with any business so long as the board deemed the project advantageous to airport development. The lease agreement in this case fit within the governing statutory authority and did not violate any federal grants.

7. Open Meetings—airport authority—decision to lease land—private negotiations before public meeting

In an action challenging an airport authority's decision to lease land for a gravel mine, where the authority was not subject to the provisions of N.C.G.S. § 160A-272 (governing municipal leasing procedures), the authority did not have to give thirty days' notice of its

special meeting on the lease decision, and its email notice more than 48 hours before the meeting complied with the applicable provision of the Open Meetings Law (N.C.G.S. § 143-138.12(b)(2)). Further, neither the Open Meetings Law nor other statutes governing public meetings required the airport authority to allow public comment or to hold a formal debate prior to voting on the lease.

Appeal by Plaintiffs from an Order entered 8 November 2019 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 23 September 2020.

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Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by J. Mitchell Armbruster and Steven M. Sartorio, and Hedrick, Gardner, Kincheloe & Garofalo LLP, by Patricia P. Shields, for defendants-appellees.

Heidgerd & Edwards, LLP, by Eric D. Edwards and C.D. Heidgerd, and Ron Sutherland, for amicus Wild Earth Society, Inc.

HAMPSON, Judge.

Factual and Procedural Background

The Umstead Coalition, Randal L. Dunn, Jr., Tamara Grant Dunn, William Doucette, and TORC (a/k/a Triangle Off-Road Cyclists) (collectively, Plaintiffs) appeal an Order granting Summary Judgment to Raleigh-Durham Airport Authority (RDUAA) and Wake Stone Corporation (Wake Stone) (collectively, Defendants) and denying Plaintiffs' request for a Preliminary Injunction related to RDUAA's lease of airport real property known as the Odd Fellows Tract to Wake Stone for a gravel mine. Relevant to this appeal, the Record before us tends to show the following:

The Umstead Coalition is a North Carolina nonprofit corporation dedicated to the appreciation, use, and preservation of the William B. Umstead State Park abutting the Odd Fellows Tract. Randal and Tamara Dunn (Dunns) are Wake County residents and live on property adjacent to the Odd Fellows Tract. William Doucette is a Wake County resident and Umstead Coalition member. TORC is a North Carolina nonprofit corporation seeking to establish and maintain mountain biking trails in the Triangle region to promote responsible mountain biking and ensure its future.

The North Carolina General Assembly chartered RDUAA in 1939 through a public-local law. An Act Enabling the City of Raleigh, the City of Durham, the County of Durham, and the County of Wake, to Jointly Establish an Airport and Providing for the Maintenance of a Joint Airport by said Cities and Counties, 1939 N.C. Sess. Laws ch. 168 (Charter). The Charter allows the cities of Raleigh and Durham, and the counties of Wake and Durham (Governing Bodies), to jointly acquire land suitable for "airports or landing fields[.]" *Id.* §§ 2-5. The Charter instructs the Governing Bodies to elect a Board of Directors (the Board) for RDUAA—with each of the Governing Bodies appointing an equal number of directors. *Id.* §§ 5-6. The Charter also required the Board to "act in an administrative capacity" and to have "the authority to control, lease, maintain, improve, operate, and regulate the joint airport or landing field." The Board was vested with "complete authority over any airport or landing field jointly acquired" by the Governing Bodies. *Id.* § 7. As a public-local law, the Charter only applied to the Governing Bodies. *Id.* § 8 ("This Act shall apply only to the City of Raleigh, City of Durham, County of Durham, and the County of Wake.").

During World War II, the federal government took ownership of the airport property administered by RDUAA. In 1946, Congress enacted the Federal Airport Act requiring any airport receiving federal funding to abide by federal aviation laws and regulations. Pub. L. 79-377, 60 Stat. 170 (1946), (later codified at 49 U.S.C. ch. 471). In 1947, the federal government executed a deed granting the airport land back to RDUAA subject to certain conditions subsequent and the right for the federal government to reenter in the event those conditions subsequent occurred.

In the ensuing decades, the General Assembly amended RDUAA's Charter and expanded the Board's authority in each successive iteration. In 1955, the General Assembly specifically added language giving the Board authority:

> To lease (without the joinder in the lease agreements of the [Governing Bodies]) for a term not to exceed 15 years, and for purposes not inconsistent with the grants and agreements under which the said airport is held by said owning municipalities, real or personal property under the supervision of or administered by the said Authority.

1955 N.C. Sess. Laws ch. 1096 § 1. This amendment also vested the Board with the authority to "operate, own, control, regulate, lease or grant" the right to operate "restaurants, apartments, hotels, motels, agricultural fairs, tracks, motion picture shows, cafes, soda fountains, or other

businesses, amusements or concessions . . . as may appear to said Authority advantageous or conducive to the development of said airport" for a term not to exceed fifteen years. *Id.* The amendment granted RDUAA the authority to erect buildings and facilities, borrow money, enter contracts, and expend funds—received from fees and rents from the operation of the above operations—for airport purposes. *Id.*

In 1957, the General Assembly further expanded RDUAA's authority to include "[i]n addition to all other rights and powers herein conferred" the "powers granted political subdivisions under the Model Airport Zoning Act contained within Article 4," within Chapter 63 of the General Statutes[1], and "by the terms of Article 6, Chapter 63 . . . concerning public airports and related facilities." 1957 N.C. Sess. Laws ch. 455 § 2. Then in 1959, the General Assembly reiterated and expanded RDUAA's authority to lease real or personal property under its administration, without joining the Governing Bodies, for terms not to exceed forty years. 1959 N.C. Sess. Laws ch. 755 § 1. The 1959 amendment also reaffirmed RDUAA's authority to "own, control, regulate, lease or grant to others the right to operate . . . restaurants, apartments, hotels, motels, agricultural fairs, tracks, motion picture shows, cafes, soda fountains, or other businesses, amusements or concessions" RDUAA deemed advantageous or conducive to airport development for terms not to exceed forty years. *Id.*

Since its creation, RDUAA has acquired land surrounding the airport pursuant to the Charter. Specific to this case, the Governing Bodies and RDUAA acquired real estate known as the Odd Fellows Tract in separate conveyances during the 1970s and 1980s. In 1979, the General Assembly again amended RDUAA's Charter to grant RDUAA the authority to bring condemnation actions under its own name without joining the Governing Bodies. 1979 N.C. Sess. Laws ch. 666 § 2.

In September of 2017, RDUAA issued a request for land lease proposals (RFP) to lease three tracts of land RDUAA controlled, including the Odd Fellows Tract. On 9 October 2017, the Conservation Fund submitted a proposal, including a lease-to-purchase proposal for the Old Fellows Tract—with a term of forty years at $12,000 per year. Wake Stone also submitted a proposal to lease the Odd Fellows Tract. On 19 October 2017, RDUAA voted to reject all proposals to lease the Odd

1. Chapter 63 of the North Carolina General Statutes broadly titled as "Aeronautics" codifies a number of different statutes adopted over the years and governs, *inter alia*, regulation of airports including authorizing municipalities and counties to establish, acquire, and operate airports. N.C. Gen. Stat. ch. 63 arts. 4, 6 (2019).

Fellows Tract. On 27 February 2019, approximately fifteen months later, RDUAA sent a Notice of Special Meeting of the Board, via email, to be held on 1 March 2019. The Special Meeting Notice announced the Board would consider a proposal for a twenty-five-year lease with Wake Stone to operate a gravel mine on the Odd Fellows Tract. *Id.* The Record indicates RDUAA and Wake Stone negotiated this lease agreement in private during the fifteen-month gap between the Board's rejection of the original RFP proposals and the Special Meeting. At the 1 March meeting, the Board announced it would discuss the lease—without public comment as the meeting was not a public hearing—and vote on the lease. The Board, with one abstention, unanimously voted to approve the lease. That same day, consistent with the Board's vote, RDUAA and Wake Stone executed an agreement for a mineral lease on the Odd Fellows Tract for a term of twenty-five years—with RDUAA to receive 5.5% of Wake Stone's annual net sales from the gravel mine.

On 12 March 2019, Plaintiffs filed a Verified Complaint for Declaratory Judgment and Injunctive Relief in Wake County Superior Court alleging: (1) RDUAA exceeded its authority and violated the Open Meetings Law by executing the lease without the Governing Bodies' approval; and (2) RDUAA violated state and federal law by approving the lease without required FAA approvals. Plaintiffs also filed Motions for a Temporary Restraining Order and a Preliminary Injunction. Plaintiffs argued Defendants' lease violated N.C. Gen. Stat. § 63-56(f), which generally applies to regulate the governing boards of airports jointly operated by two or more municipalities. *See* N.C. Gen. Stat. § 63-56 (2019). Plaintiffs contended this statute requires jointly operated municipal airport boards to obtain approval from the governing bodies prior to leasing land for non-aeronautic uses. Plaintiffs also argued the lease violated N.C. Gen. Stat. § 160A-272 requiring municipalities to follow certain procedures for the extended-term lease of real property. Finally, Plaintiffs argued RDUAA violated North Carolina's Open Meetings Law, N.C. Gen. Stat. § 143-318.9 *et seq*., governing procedures for conducting public meetings and hearings.

On 17 April 2019, RDUAA filed an Answer and a Counterclaim specifically against TORC alleging TORC, "through its members and agents," was trespassing on RDUAA property. Wake Stone filed its Answer on 20 May 2019. With the trial court's leave, Plaintiffs filed an Amended Verified Complaint for Declaratory Judgment and Injunctive Relief on 24 July 2019. The Amended Complaint added an allegation RDUAA violated state and federal law by approving the lease without FAA approval, and its 2017 RFP by conducting subsequent private negotiations. RDUAA and Wake Stone filed new Motions to Dismiss and for Summary

Judgment on 7 August 2019. Plaintiffs filed a new Motion for Partial Summary Judgment that same day. RDUAA filed an Answer to Plaintiffs' Amended Complaint and renewed its counterclaim against TORC on 23 August 2019. Plaintiffs then filed a Motion for Permanent Injunction on 5 September 2019. TORC filed an Answer to RDUAA's Counterclaim on 13 September 2019.

Following a hearing and after considering the parties' briefs, arguments, and supporting materials, the trial court entered a Final Order and Decision (Order) on 8 November 2019. As part of its Order, the trial court included a list of "Undisputed Facts." The trial court concluded there was "no genuine dispute as to the material facts" and RDUAA was entitled to summary judgment as a matter of law because the lease with Wake Stone was within the "expansive powers" the General Assembly vested in RDUAA. The trial court also ruled N.C. Gen. Stat. § 63-56 did not apply to RDUAA because RDUAA was not "a board formed by an agreement between . . . municipalities," but was an "independent creation of the General Assembly[.]" Moreover, the trial court determined N.C. Gen. Stat. § 160A-272 did not apply to RDUAA because RDUAA was not a "city" within the scope of Chapter 160A, but rather a corporation "organized for a special purpose." The trial court also concluded RDUAA satisfied the Open Meetings Law because the Special Meeting was properly noticed and public comments were not required. Accordingly, the trial court granted Summary Judgment in Defendants' favor and denied Plaintiffs' Motion for Partial Summary Judgment and Motion for Preliminary Injunction. The trial court did not rule on RDUAA's Counterclaim for trespass against TORC. On 4 December 2019, Plaintiffs filed written Notice of Appeal from the trial court's Order denying Plaintiffs' Motions for Partial Summary Judgment and for a Preliminary Injunction and granting Defendants' Motions for Summary Judgment.

Jurisdiction

As a threshold matter, when it was entered, the trial court's Order was interlocutory because it left open the Counterclaim against TORC. Plaintiffs have, however, filed both a Petition for Writ of Certiorari and a Motion requesting us to take judicial notice of Wake Stone's subsequent Voluntary Dismissal of its Counterclaim. Additionally, the parties dispute whether Plaintiffs have standing to bring their claims in the first place. We address these jurisdictional issues in turn.

A. Appealable Judgment

[1] Initially, the trial court's dismissal of Plaintiffs' claims was interlocutory in nature because RDUAA's Counterclaim was still pending. *Veazey*

v. City of Durham, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court[.]"). Because the trial court's Order was interlocutory, Plaintiffs may not have had a right to immediately appeal the Order. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990) ("Generally, there is no right of immediate appeal from interlocutory orders and judgments."). Plaintiffs have filed a Motion to Take Judicial Notice of Defendants' Voluntary Dismissal of the Counterclaim against TORC. Although the Voluntary Dismissal disposes of the case with the trial court—rendering the Order a final judgment—a motion to take judicial notice is not the proper mechanism to establish this fact on the Record. *Horton v. New South Ins. Co.*, 122 N.C. App. 265, 267-68, 468 S.E.2d 856, 857 (1996) ("[T]he proper method to request amendment of the record, when the inclusion of the document has not been addressed by a trial court order settling the record on appeal, is to make a motion in the appellate court to amend the record under N.C.R. App. P. 9(b)(5)."). Accordingly, we deny Plaintiffs' Motion to Take Judicial Notice.

[2] However, under Rule 9 of our Rules of Appellate Procedure, we may also amend the Record on our own initiative. N.C.R. App. P. 9(b)(5)(b) (2020). In the absence of any objection by any party to our consideration of the Voluntary Dismissal, we amend the Record to include the Voluntary Dismissal. Thus, the Record before us, as amended, demonstrates the trial court's Order is now final and Plaintiffs have an immediate right to appeal under N.C. Gen. Stat. § 7A-27(b)(1). Plaintiffs, recognizing their appeal was initially interlocutory, also filed a Petition for Writ of Certiorari seeking review of this case on appeal. Because we have amended the Record and determined Plaintiffs have the right to appellate review from a final judgment, we dismiss Plaintiffs' Petition for Writ of Certiorari as moot.

B. Standing

[3] The parties also dispute whether Plaintiffs have standing to bring their claims. Although the parties argued standing to the trial court, the trial court's Order disposes of the Motions for Summary Judgment without expressly addressing standing. "When the record is silent and the appellate court is unable to determine whether the court below had jurisdiction, the appeal should be dismissed." *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981). The question here is whether the Record before us is adequate to establish that Plaintiffs have standing.

Defendants present no argument against Plaintiffs' standing to challenge an Open Meetings Law violation. Indeed, the Open Meetings Law

allows "[a]ny person" to "bring an action in the appropriate division of the General Court of Justice seeking . . . an injunction" based on violations of the Open Meetings Law without a showing of "special damage different from that suffered by the public at large." N.C. Gen. Stat. § 143-318.16(a) (2019). Moreover, "[a]ny person" may "institute a suit in the superior court requesting . . . a judgment declaring that any action of a public body was taken . . . in violation of this Article. Upon such a finding, the court may declare any such action null and void." N.C. Gen. Stat. § 143-318.16A(a) (2019). Because Plaintiffs allege RDUAA voted for the lease in a public meeting that violated the Open Meetings Law, they all have statutory standing to bring those claims.

[4] Defendants instead contend Plaintiffs have no standing to challenge the validity of the lease itself in the absence of any showing the Board's approval of the lease resulted in special damages to any of the Plaintiffs. Plaintiffs, in response, contend at a minimum the Dunns have standing, as adjacent property owners, to challenge the lease agreement. Plaintiffs assert the Dunns have shown standing to challenge the lease because they presented evidence the use of the Odd Fellows Tract adjacent to their property as a gravel mine—in conjunction with RDUAA's condemnation authority—would diminish their property value resulting in special damages to them. Defendants argue the Dunns have no standing to challenge the lease, even as adjacent property owners, because the lease is a legal use of RDUAA's real property.

At a minimum, standing contains three elements:

> (1) "injury in fact"—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

McDaniel v. Saintsing, 260 N.C. App. 229, 232, 817 S.E.2d 912, 914 (2018) (citation and quotation marks omitted).

Here, the Dunns allege Defendants' lease agreement was outside the scope of RDUAA's statutory authority to enter leases—and thus not a lawful land use—and have alleged a reduction in their property value, as well as an increase in noise and vibration as a result of Wake Stone's expansion of its existing mine next to the Dunns' property. In addition, for purpose of summary judgment, the Dunns supported these allegations with an affidavit from Robert Mulder, a licensed real estate broker, opining the presence of the gravel mine on property adjacent to

the Dunns' would have a material adverse effect on the Dunns' property value. Defendants have offered no forecast of evidence controverting this opinion. Accordingly, for purposes of our review of the trial court's grant of Summary Judgment, we conclude the Dunns have forecast sufficient evidence of their standing to challenge Defendants' lease agreement.

Issues

The dispositive issues on appeal are whether the trial court properly concluded: (I) Defendants' lease agreement was within RDUAA's statutory authority; and (II) RDUAA's Special Public Meeting complied with North Carolina's Open Meetings Law.

Standard of Review

Plaintiffs contend the trial court erred in denying their Motion for a Preliminary Injunction and in granting Defendants' Motion for Summary Judgment when the trial court concluded N.C. Gen. Stat. § 63-56, governing jointly operated municipal airports, and N.C. Gen. Stat. § 160A-272, governing municipal leasing procedures, did not apply to RDUAA; Defendants' lease agreement was within RDUAA's statutory authority; and RDUAA's Special Meeting where the Board voted in favor of the lease agreement satisfied the Open Meetings Law.

When reviewing a trial court's denial of a preliminary injunction, "an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself[;]" however, "a trial court's ruling . . . is presumed to be correct, and the party challenging the ruling bears the burden of showing it was erroneous." *Goad v. Chase Home Finance, LLC*, 208 N.C. App. 259, 261, 704 S.E.2d 1, 3 (2010) (citations and quotation marks omitted). In order to succeed on a motion for a preliminary injunction, a plaintiff must be able to show—in part—the likelihood of success on the merits of the plaintiff's case. *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). Therefore, our review of whether the trial court erred in denying Plaintiffs' Motion for a Preliminary Injunction first turns on whether it erred in granting Defendants' Motion for Summary Judgment.

"Our standard of review of an appeal from summary judgment is de novo[.]" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is only appropriate "when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Id.* (citation and quotation marks omitted).

Analysis

I. RDUAA's Authority to Enter into the Lease with Wake Stone

A. Applicable law governing RDUAA's authority

[5] Plaintiffs argue Defendants' lease agreement violates statutory leasing requirements for airports created under N.C. Gen. Stat. § 63-56(f). Plaintiffs also contend Defendants' lease agreement violates leasing procedures for municipalities under N.C. Gen. Stat. § 160A-272. Under Section 63-56(f):

> No real property and no airport, other air navigation facility, or air protection privilege, owned jointly, shall be disposed of by the board, by sale, or otherwise, except by authority of the appointed governing bodies, but the board may lease space, area or improvements and grant concessions on airports for aeronautical purposes or purposes incidental thereto.

N.C. Gen. Stat. § 63-56(f) (2019). Section 160A-272(a1) states a municipal governing board is only permitted to lease municipal property "pursuant to a resolution of the [board] authorizing the execution of the lease or rental agreement adopted at a regular council meeting upon 30 days public notice." N.C. Gen. Stat. § 160A-272(a1) (2019). Meanwhile, Section 160A-272(b1) states leases of municipal property for more than ten years must be treated as property sales subject to advertisement and bidding requirements. N.C. Gen. Stat. § 160A-272(b1) (2019). Thus, Plaintiffs contend Defendants' twenty-five-year lease of the Odd Fellows Tract for a non-aeronautic purpose, adopted at a special meeting with two-days notice, and not subject to a bidding process—after the original RFP—would violate both of these statutes if these statutes applied to limit RDUAA's authority to enter into the gravel mine lease.

First:

> [W]here one statute deals with the subject matter in detail with reference to a particular situation and another statute deals with the same subject matter in general and comprehensive terms, the particular statute will be construed as controlling the particular situation unless it clearly appears that the General Assembly intended to make the general act controlling in regard thereto . . . .

Nat'l Med. Enters., Inc. v. Sandrock, 72 N.C. App. 245, 249, 324 S.E.2d 268, 271 (1985) (citation and quotation marks omitted). Moreover, as the

trial court noted, "[a] local statute enacted for a particular municipality is intended to be exceptional, and for the benefit of such municipality, and is not repealed by an enactment of a subsequent general law." *Bland v. City of Wilmington*, 278 N.C. 657, 663, 180 S.E.2d 813, 817 (1971) (quoting *City of Charlotte v. Kavanaugh*, 221 N.C. 259, 263, 20 S.E.2d 97, 99 (1942)). Indeed, "[a] public local law applicable to a particular county or municipality is not repealed by a subsequently enacted public law, statewide in its application, on the same subject matter, unless repeal is expressly provided for or arises by necessary implication." *Fogle v. Gaston Cnty. Bd. of Ed.*, 29 N.C. App. 423, 426, 224 S.E.2d 677, 679 (1976). "The general law will not . . . repeal an existing particular or special law, unless it is plainly manifest from the terms of the general law that such was the intention of the lawmaking body. A general later affirmative law does not abrogate an earlier special one by mere implication." *Id.* (quoting *Kavanaugh*, 221 N.C. 259, 20 S.E.2d 97 (1942)) (quotation marks omitted).

The General Assembly allowed RDUAA's Governing Bodies to establish a jointly owned airport by public-local law in 1939. Nothing in Chapter 63 expressly repeals any prior law relating to RDUAA's Charter. Nor is there any indication the General Assembly subsequently acted to repeal any RDUAA Charter provisions by necessary implication. To the contrary, the General Assembly's subsequent amendments to RDUAA's Charter specifically address the Board's authority to lease property owned by the Governing Bodies and administered by the Board. Thus, the General Assembly confirmed its intent to remove RDUAA from limitations imposed by N.C. Gen. Stat. § 63-56 on leasing of airport property and expressly granted the Board specific authority to lease land for terms not exceeding forty years. *Nat'l Med. Enters.*, 72 N.C. App. at 249, 324 S.E.2d at 271.

Plaintiffs further argue the 1957 amendment to the Charter authorizing RDUAA to exercise authority granted to municipalities under Article 6 of Chapter 63, which contains Section 63-56, demonstrates the General Assembly intended to incorporate Chapter 63, and specifically Section 63-56, into RDUAA's Charter as a limitation on RDUAA's authority. As the trial court correctly concluded, however, the plain language of the 1957 amendment shows this amendment was a grant of authority "[i]n addition to all other rights and powers herein conferred" and did not serve to limit RDUAA's authority under its Charter.[2]

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2. Plaintiffs argue the fact RDUAA previously appeared to rely on authority granted under the Uniform Airport Act, including in a 1977 condemnation action and a 1982 timber deed, is evidence the General Assembly did, in fact, intend to limit RDUAA's authority by

Similarly, the trial court also properly concluded the provisions of N.C. Gen. Stat. § 160A-272 do not apply to limit RDUAA's authority. Although, Section 160A-272 serves to regulate leasing of property by a "city," N.C. Gen. Stat. § 160A-272, "city" is a defined term under Chapter 160A and "[t]he term 'city' does not include . . . municipal corporations organized for a special purpose" like RDUAA. N.C. Gen. Stat. § 160A-1(2) (2019). Even if it did, Section 160A-2 provides: "Nothing in this Chapter shall repeal or amend any city charter in effect as of January 1, 1972, . . . unless this Chapter or a subsequent enactment . . . shall clearly show a legislative intent to repeal or supersede all local acts." N.C. Gen. Stat. § 160A-2 (2019); *see also* N.C. Gen. Stat. § 160A-3 (2019) (titled "General laws supplementary to charters"). Again, nothing in the Record before us demonstrates Chapter 160A contains "any clear legislative intent to repeal or supersede" any authority or power granted to RDUAA by its Charter and subsequent amendments. Therefore, the trial court correctly concluded Sections 63-56 and 160A-272 did not apply to limit or regulate RDUAA's authority to enter into the lease with Wake Stone.

B. RDUAA's authority to enter the lease under its Charter

[6] Having concluded RDUAA's Charter is not limited by Sections 63-56 or 160A-272 of our General Statutes, we must determine whether the Board had the authority to execute the lease agreement under the terms of its Charter. Plaintiffs argue RDUAA did not have a broad grant giving it "complete authority" over airport property, and the lease was inconsistent with the grants and agreements under which the airport is held; therefore, RDUAA could not enter into this lease agreement without joining the Governing Bodies. For the following reasons, we disagree.

"The General Assembly delegates express power to municipalities by adopting an enabling statute, which includes implied powers . . . essential to the exercise of those which are expressly conferred." *Quality Built Homes, Inc. v. Town of Carthage*, 369 N.C. 15, 19, 789 S.E.2d 454, 457 (2016) (citation and quotation marks omitted). "When determining the extent of legislative power conferred upon a municipality, the plain language of the enabling statute governs." *Id.* If the enabling statute's

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enactment of the Uniform Airport Act and that RDUAA relied on the provisions of the Uniform Airport Act to engage in these transactions. However, the timber deed contains no citation to any general statute requiring the Governing Bodies' joinder in the conveyance. Also, it appears RDUAA had to use the authority granted under Chapter 63 in the condemnation action because the General Assembly did not grant RDUAA the independent authority to conduct condemnation proceedings in its own name until 1979. The judgment confirming RDUAA's condemnation action cites Chapter 63 as a source of authority, not a limit on RDUAA's authority.

language is "clear and unambiguous," courts must give the language its "plain and definite meaning." *Id.* However, if the enabling language is ambiguous, "the legislation 'shall be broadly construed . . . to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect.' " *Id.* (quoting N.C. Gen. Stat. § 160A-4).

In this case, the enabling statute delegating legislative authority to RDUAA is the Charter and its subsequent amendments as enacted through public-local laws. In pertinent part, the Charter—as amended—grants RDUAA the authority to lease, without joining the Governing Bodies and for purposes not inconsistent with the grants and agreements under which the airport is held, real or personal property administered by RDUAA. 1959 N.C. Sess. Laws ch. 755 § 1. This amendment restricted such leases to those consistent with the "grants and agreements" controlling the property and to terms not longer than forty years. The Charter also grants RDUAA the authority to "operate, own, control, regulate, *lease* or grant . . . any airport premises, restaurants, apartments, hotels, motels, agricultural fairs, tracks . . . *or other businesses*, *amusements or concessions* for a term not to exceed 40 years, as may appear to [RDUAA] advantageous or conducive to the development of said airport." *Id.* (emphasis added).

First, the Charter is unambiguous in that it grants the Board authority to lease[3] *any* property administered by RDUAA. This unambiguous language, by its plain and definite meaning, grants RDUAA broad authority subject only to the "grants and agreements" under which the property is held and for terms not to exceed forty years. The applicable "grants and agreements" would include any grant or agreement which imposes restrictions on the use of airport property. The only such grants or agreements in the Record are the deed reconveying certain property the federal government controlled during World War II and any grants governed by the FAA.

There is no evidence on this Record the lease agreement violated any FAA grants.[4] Plaintiffs, nevertheless, argue the lease agreement

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3. Plaintiffs also argue the term "lease" does not include a mineral lease like the one in question. As with the statute's other language, we hold the term "lease" is unambiguous and includes any type of lease. If the term unambiguously prohibited mineral leases, the Charter would have to do so expressly. It does not. Moreover, if we found the term ambiguous, we would have to construe the term broadly to give RDUAA the authority to enter any lease it deemed advantageous to airport development.

4. Plaintiffs contend there is a genuine dispute as to whether RDUAA complied with Federal Aviation Administration (FAA) requirements regarding its Airport Layout Plan

violated the deed reconveying property after World War II because the deed prohibited use of the property for industrial purposes and reserved a right of reentry if the terms were violated. However, the deed reconveying property commandeered by the federal government only applies to the property in existence at the time of the reconveyance, not to land acquired thereafter such as the Odd Fellows Tract. Even if the deed restrictions applied, there is no evidence any federal agency has determined the lease agreement in this case violates the deed restrictions or that the federal government has attempted to exercise its right of reentry.

Thus, the remaining question is whether the language authorizing RDUAA to operate, own, control, or lease property for the list of express uses or for "other businesses" RDUAA deems advantageous for airport development provides authority for the lease in question. Plaintiffs argue this language is unambiguous and the list of expressly permitted uses governs the types of "other businesses" to which RDUAA may lease property.

The North Carolina Supreme Court's decision in *Quality Built Homes Inc. v. Town of Carthage* is instructive here. 369 N.C. 15, 789 S.E.2d 454. In *Quality Built Homes Inc.*, the Town of Carthage enacted ordinances requiring landowners seeking to subdivide property to pay impact fees for planned water and sewer services. *Id.* at 16-17, 789 S.E.2d at 456. As a municipality established under Chapter 160A, the Town of Carthage was subject to enabling language stating a "city shall have authority to acquire, construct, establish, enlarge, improve, maintain, own, operate, and contract for the operation of any or all of the public enterprises . . . to furnish services." N.C. Gen. Stat. § 160A-312(a) (2015). Moreover, the statute granted the town "full authority to finance the cost of any public enterprise by levying taxes, borrowing money, and appropriating any other revenues therefor." N.C. Gen. Stat. § 160A-313 (2015). The Court held these statutes unambiguously allowed the town to charge for *contemporaneous* water and sewer usage. *Quality Built Homes Inc.*, 369 N.C. at 20, 789 S.E.2d at 458. However, because the

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(ALP) approval prior to leasing airport land to third parties. We are not convinced the Record establishes a dispute on this fact as the FAA has conditionally approved RDUAA's ALP, and it does not appear on the Record before us that there has been any attempt to challenge this conditional approval with the FAA or in federal courts. *See* 49 U.S.C. § 46110(a) ("[A] person" challenging an order "issued by . . . the Administrator of the [FAA] . . . may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia or . . . the circuit in which the person resides . . . .").

ordinances charged impact fees in contemplation of *future* services, the ordinances fell outside the scope of the town's statutory authority. *Id*. at 21-22. 789 S.E.2d at 458-59.

In this case, the enabling statute—the Charter—is unambiguous with respect to the list of expressly authorized concessions and amusements. However, the General Assembly included "or other businesses, concessions, or amusements"—the list was not exhaustive and was not restrictive. The only restriction added to this sentence requires RDUAA to deem other such businesses advantageous or conducive to airport development. Therefore, RDUAA could enter into a lease with *any* other business, subject only to: (1) the forty-year term limit; (2) any FAA restrictions based on federal grants; and (3) the requirement RDUAA deem the transaction advantageous to airport development.

Here, unlike in *Quality Built Homes Inc.*, RDUAA's Charter expressly contemplates the Board engaging in transactions *prospectively* to bring financial benefits to the airport. The lease agreement in question would provide 5.5% of net sales from any material sold by Wake Stone. Therefore, the lease satisfies the requirement RDUAA only enter into leases it deems *may* be advantageous to airport development. Accordingly, the trial court properly concluded Defendants' lease agreement was within RDUAA's statutory authority under its Charter. We likewise conclude because RDUAA was not governed by the limitations on jointly operated municipal airports in Section 63-56 and had independent statutory authority to enter into the lease with Wake Stone, the joinder of the Governing Bodies in the lease was not required.

II. Open Meetings Law

[7] Plaintiffs also contend RDUAA's months of private negotiations and the email notice two days prior to a special public meeting, where the Board allowed no public comment, violated North Carolina's Open Meetings Law.

N.C. Gen. Stat. § 143-318.9 *et seq.* comprises North Carolina's Open Meetings Law. Section 143-318.9 expresses the General Assembly's intent where:

> the public bodies that administer the legislative, policy-making, quasi-judicial, administrative, and advisory functions of North Carolina and its political subdivisions exist solely to conduct the people's business, it is the public policy of North Carolina that the hearings, deliberations, and actions of these bodies be conducted openly.

N.C. Gen. Stat. § 143-318.9 (2019). The General Assembly applied these laws to all public bodies conducting "the people's business." As an "appointed authority [or] board," RDUAA must comply with the Open Meetings Law. N.C. Gen. Stat. § 143-318.10(b) (2019). "[E]ach official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting." N.C. Gen. Stat. § 143-318.10(a) (2019). Every public body conducting regularly scheduled meetings must post a schedule as the statute directs. N.C. Gen. Stat. § 143-318.12(a) (2019). If a public body holds a "special meeting" outside of a regularly scheduled meeting, it must provide notice at least forty-eight hours before the meeting. N.C. Gen. Stat. § 143-318.12(b)(2) (2019). "Any person" may bring an action for injunctive relief or declaratory judgment for alleged violations of these laws. N.C. Gen. Stat. §§ 143-318.16, 318.16A (2019).

Here, the meeting to vote on the lease agreement was scheduled as a Special Meeting subject to requirements outlined in Section 143-318.12(b). The Record shows RDUAA emailed notice of the Special Meeting more than 48 hours before the meeting.[5] Plaintiffs contend the 48-hour notice was improper, arguing the Board could only consider the lease agreement at a regularly scheduled Board meeting with thirty-days notice pursuant to N.C. Gen. Stat. § 160A-272. Plaintiffs concede, however, that if Section 160A-272 does not apply, then the forty-eight-hour notice of the Special Meeting was valid. Thus, we conclude the notice of Special Meeting complied with N.C. Gen. Stat. § 143-318.12(b)(2).

Nevertheless, Plaintiffs argue the Board should have permitted public comment on the lease prior to deliberating and voting to approve the lease at the Special Meeting. We disagree.

This Court has previously recognized:

> There is nothing in section 143-318.9 requiring the solicitation of public comment as a prerequisite to a vote on a pending motion. Furthermore, although section 143-318.9 requires "deliberations" of public bodies "be conducted openly," we do not read this statute to mandate a formal discussion or debate of an issue. Section 143-318.9 simply requires that if there is any discussion or debate of "public business" at an "official meeting," that discussion or debate must occur in a meeting open to the

5. Plaintiffs argue RDUAA violated statutory provisions requiring municipalities and counties give thirty-days notice for a public meeting regarding municipal land leases. As we conclude above, these general statutes regarding municipal land leases do not apply to RDUAA as an entity created by public-local laws.

public with "any person . . . entitled to attend." N.C.G.S. § 143-318.10(a), (d) (1999).

Sigma Constr. Co. v. Guilford Cnty. Bd. of Ed., 144 N.C. App. 376, 381, 547 S.E.2d 178, 181 (2001). Moreover, there is no independent statutory provision requiring RDUAA's Board to receive public comments or conduct a public hearing prior to consideration of a lease agreement under the Charter. *See*, *e.g.*, N.C. Gen. Stat. § 153A-304(c) (2019) (requiring public hearings when counties seek to consolidate districts); N.C. Gen. Stat. § 160A-191 (2019) (requiring public hearings before cities enact Sunday closing ordinances). Therefore, RDUAA did not violate the Open Meetings Law. *See Sigma Constr. Co.*, *Inc.*, 144 N.C. App. at 381, 547 S.E.2d at 181. Thus, the trial court did not err in concluding RDUAA's Special Meeting did not violate the Open Meetings Law.

Conclusion

Consequently, for the foregoing reasons, we conclude the trial court did not err in granting Summary Judgment in favor of Defendants. Therefore, Plaintiffs could also not demonstrate a likelihood of success on the merits of their claims; thus, the trial court did not err in denying Plaintiffs' Motion for a Preliminary Injunction and Motion for Partial Summary Judgment. Accordingly, we affirm the trial court's Order.

AFFIRMED.

Judges BRYANT and COLLINS concur.

UNITED DAUGHTERS OF THE CONFEDERACY, N. CAROLINA DIV., INC. v. CITY OF WINSTON-SALEM

[275 N.C. App. 402 (2020)]

UNITED DAUGHTERS OF THE CONFEDERACY, NORTH CAROLINA DIVISION, INC., AND JAMES B. GORDON CHAPTER #211 OF THE UNITED DAUGHTERS OF THE CONFEDERACY, NORTH CAROLINA DIVISION, INC., PLAINTIFFS

v.

CITY OF WINSTON-SALEM, BY AND THROUGH ALLEN JOINES, MAYOR OF WINSTON-SALEM, NORTH CAROLINA, COUNTY OF FORSYTH, BY AND THROUGH DAVID R. PLYER, CHAIRMAN OF THE BOARD OF COMMISSIONERS, AND WINSTON COURTHOUSE, LLC, DEFENDANTS

No. COA19-947

Filed 15 December 2020

1. Civil Procedure—dismissal with prejudice—Rule 12—lack of subject matter jurisdiction—failure to state a claim

In a declaratory judgment action regarding the removal of a Confederate statue from a local county courthouse, the trial court properly dismissed plaintiff's complaint with prejudice where it did so pursuant to both Civil Procedure Rule 12(b)(1) (lack of subject matter jurisdiction) and Rule 12(b)(6) (failure to state a claim). Although dismissal with prejudice operates as an adjudication on the merits while a dismissal pursuant to Rule 12(b)(1) does not, dismissal with prejudice pursuant to Rule 12(b)(6)—which does operate as an adjudication on the merits—was proper, and therefore any error resulting from dismissal pursuant to Rule 12(b)(1) was rendered harmless.

2. Civil Procedure—failure to state a claim—lack of standing—injury in fact—removal of Confederate statue

In a declaratory judgment action filed after a city and its mayor (defendants) informed an association commemorating Confederate Civil War soldiers (plaintiff) of its plans to remove a Confederate statue from a county courthouse, the trial court properly dismissed plaintiff's complaint for lack of standing pursuant to Civil Procedure Rule 12(b)(6) (failure to state a claim). Specifically, plaintiffs failed to allege ownership rights or any other legally protected interest in the statue, which was located on private property, and therefore failed to allege the "injury in fact" required to show it had standing to bring the action.

Judge TYSON dissenting.

**UNITED DAUGHTERS OF THE CONFEDERACY, N. CAROLINA DIV., INC.
v. CITY OF WINSTON-SALEM**

[275 N.C. App. 402 (2020)]

Appeal by plaintiff from order entered 8 May 2019 by Judge Eric C. Morgan in Forsyth County Superior Court. Heard in the Court of Appeals 17 March 2020.

James A. Davis & Associates, by James A. Davis, and James B. Wilson & Associates, by James Barrett Wilson, Jr., for plaintiff-appellant United Daughters of the Confederacy, North Carolina Division, Inc.

City Attorney Angela I. Carmon, and Assistant City Attorney Anargiros N. Kontos, for defendant-appellee City of Winston-Salem.

B. Gordon Watkins III for defendant-appellee Forsyth County.

Allman Spry Davis Leggett & Crumpler, P.A., by Jodi D. Hildebran, for defendant-appellee Winston Courthouse, LLC.

BRYANT, Judge.

Where the trial court dismissed plaintiff's complaint pursuant to Rules 12(b)(1) and 12(b)(6), we hold that it did not err in dismissing the complaint with prejudice on the basis of Rule 12(b)(6). Where the allegations in plaintiff's complaint—taken as admitted—failed to allege an injury in fact, the trial court did not err in granting defendants' motions to dismiss the complaint for failure to state a claim. Accordingly, we affirm the order of the trial court.

Factual and Procedural Background

On 31 January 2019, plaintiff United Daughters of the Confederacy, North Carolina Division, Inc., filed a verified complaint in Forsyth County Superior Court seeking a declaratory judgment against defendants City of Winston-Salem, by and through Allen Joines, its mayor, and Forsyth County, by and through David R. Plyer, chair of the Board of Commissioners. In its complaint, plaintiff alleged that in 1903, the James B. Gordon Chapter #211 (of plaintiff organization) sought to place a confederate monument, a statue, in Courthouse Square in Winston, North Carolina, and in 1905, the Forsyth County Board of Commissioners granted permission to do so. The Forsyth County Courthouse was nominated to the National Registry of Historic Places in 2012, and the nomination was accepted in 2013. In 2014, the property designated as the Courthouse, with the exception of a plaque inside the building and a buried time capsule, was conveyed to Winston Courthouse, LLC

by Forsyth County.[1] In April of 2017, Mayor Joines agreed to move the statue to the Salem Cemetery, and on 31 December 2018, the City and Mayor Joines contacted plaintiff and informed plaintiff that it had until 31 January 2019 to remove the statue. Plaintiff sought a declaratory judgment to determine the rights of the parties with respect to the statue. Contemporaneously, plaintiff also filed a motion for a temporary restraining order and preliminary injunction, to prevent the relocation of the statue pending the litigation. The trial court denied the motion for a temporary restraining order.

On 6 February 2019, plaintiff filed a verified amended complaint joining James B. Gordon Chapter #211 of the United Daughters of the Confederacy, North Carolina Division, Inc., as a plaintiff[2] and Winston Courthouse, LLC, as a defendant. The amended complaint combined the two prior pleadings seeking a declaratory judgment and a preliminary injunction. Plaintiff also filed a separate amended motion for preliminary injunction.

On 8 March 2019, the City filed a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure, alleging a lack of subject matter jurisdiction and failure to state a claim, respectively. Specifically, the City argued that plaintiff did not claim to own the statue or the real property beneath it, that plaintiff failed to forecast evidence that the County owned the statue, and that plaintiff, in fact, had conveyed the statue to a third party. Accordingly, plaintiff lacked standing to bring the action regarding the removal of the statue. The City further noted that plaintiff's statutory argument regarding statues on public property did not apply, because the real property on which the statue stood was not public property; the land was owned by Winston Courthouse, LLC. Finally, because plaintiff did not assert ownership of the statue, and the City and Winston Courthouse, LLC, planned to remove the statue for safety reasons, the City argued that plaintiff failed to show "a violation of [its] legal rights, and [has] therefore failed to state a claim for relief[.]" The County and Winston Courthouse, LLC, filed similar motions to dismiss plaintiff's action.

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1. The trial court subsequently found that "public monuments located outside of the building on the land" were likewise exempted from the transfer.

2. On 1 May, 2019, James B. Gordon Chapter #211 of the United Daughters of the Confederacy, North Carolina Division, Inc., filed a voluntarily dismissal. As such, we will refer only to the initial plaintiff, United Daughters of the Confederacy, North Carolina Division, Inc., throughout this opinion.

On 20 March 2019, plaintiff filed a second amended motion for preliminary injunction alleging that the City had removed the statue. Plaintiff sought the injunction to force the City to return the statue to Courthouse Square.

On 8 May 2019, the trial court entered an order on defendants' motions to dismiss. The court found that plaintiff did not claim ownership of the statue and in fact, never alleged any rights. The court concluded that plaintiff's membership requirement of genealogical relationship to a Confederate soldier was insufficient to convey standing, that plaintiff did not allege ownership or any "other legally enforceable right" to the statue sufficient to convey standing, and that plaintiff failed to establish "that there [wa]s any injury in fact that [wa]s either concrete or particularized to this specific plaintiff." The court therefore held that plaintiff lacked standing, and granted defendants' motions to dismiss pursuant to Rule 12(b)(1), for lack of subject matter jurisdiction. Further, the court granted defendants' motions to dismiss pursuant to Rule 12(b)(6), for failure to state a claim on which relief could be granted. Accordingly, the trial court dismissed plaintiff's amended complaint with prejudice.

Plaintiff appeals.

In two separate arguments, plaintiff contends that the trial court erred by granting defendants' motion to dismiss the complaint. We address each in turn.

Standard of Review

"This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

Dismissal With Prejudice

[1] In its first argument, plaintiff contends the trial court erred by dismissing the complaint with prejudice. We disagree.

Plaintiff argues that a court "cannot dismiss a complaint with prejudice if it has held that it lacks jurisdiction over the proceeding." In support of this contention, plaintiff cites this Court's opinion in *Cline v. Teich*, 92 N.C. App. 257, 374 S.E.2d 462 (1988). In *Cline*, the spouse

of an incompetent brought a claim in district court seeking an award of support from the incompetent's estate. The incompetent's guardian moved to dismiss the complaint pursuant to Rule 12(b)(6) based on the existence of a premarital agreement, and the trial court granted the motion. The spouse appealed. On appeal, this Court held that the district court lacked jurisdiction in this matter altogether, for while a district court has jurisdiction over the question of alimony, the superior court has jurisdiction over the estates of incompetents. Where no divorce was alleged or sought, this was an issue of an incompetent's estate, and thus, the district court lacked jurisdiction to hear it. Therefore, this Court vacated the decision of the trial court and remanded the matter with instructions to dismiss the complaint for lack of subject matter jurisdiction.

Plaintiff contends this case stands for the principle that it is improper to dismiss a complaint with prejudice when jurisdiction is lacking. This is an incomplete statement of law, as well as an inaccurate statement of the holding in *Cline*. Plaintiff argues, albeit circuitously, that a dismissal with prejudice operates as an adjudication on the merits, while a dismissal on the basis of subject matter jurisdiction does not. This much is true. However, that does not preclude the outcome in this case.

In *Street v. Smart Corp.*, 157 N.C. App. 303, 578 S.E.2d 695 (2003), the defendant moved to dismiss the complaint pursuant to Rules 12(b)(1) and 12(b)(6). The trial court granted the motion to dismiss dismissing the action with prejudice based on lack of standing. The plaintiff appealed, and this Court held that the trial court's dismissal with prejudice, which operated as an adjudication on the merits, "implicate[d] a Rule 12(b)(6), rather than a Rule 12(b)(1), dismissal." *Id.* at 305, 578 S.E.2d at 698. Key to the holding was that while dismissal pursuant to Rule 12(b)(1) did not operate as an adjudication on the merits, dismissal pursuant to Rule 12(b)(6) did, and the latter remedies any error with regard to the former. We ultimately affirmed the trial court's decision.

Thus, even assuming *arguendo* that it was improper to dismiss the complaint with prejudice on the basis of Rule 12(b)(1), it was not improper to do so on the basis of Rule 12(b)(6), which operates as an adjudication on the merits. Defendants did indeed move for dismissal pursuant to both Rules 12(b)(1) and 12(b)(6), and the trial court granted dismissal on both bases. We therefore hold that the trial court did not err in dismissing the complaint with prejudice pursuant to Rule 12(b)(6), and that any error in doing so pursuant to Rule 12(b)(1) was rendered harmless as a result.

Standing

[2] In its second argument, plaintiff contends the trial court erred in dismissing the complaint based on a lack of standing. We disagree.

Through several arguments, plaintiff contends that dismissal for lack of standing was inappropriate because plaintiff was entitled to adjudicate the issue of ownership rights in the statue. We disagree. Plaintiff's complaint, on its face, established no basis for ownership or any other interest in a statue which plaintiff did not claim to own, and which was located on privately-owned property.

To establish standing, a plaintiff must demonstrate three things: injury in fact, a concrete and actual invasion of a legally protected interest; the traceability of the injury to a defendant's actions; and the probability that the injury can be redressed by a favorable decision. *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 51–52 (2002). The mere filing of a declaratory judgment is not sufficient, on its own, to grant a plaintiff standing. *See Beachcomber Prop., L.L.C. v. Station One, Inc.*, 169 N.C. App. 820, 824, 611 S.E.2d 191, 194 (holding that a plaintiff who lacked "injury in fact" lacked standing to bring a declaratory judgment action).

Thus, to pursue a declaratory judgment as to its rights in the statue, plaintiff had to show, at the very least, that it possessed some rights in the statue—a legally protected interest invaded by defendants' conduct. In an attempt to make such a showing, plaintiff cites this Court's opinion in *Metcalf v. Black Dog Realty, LLC*, 200 N.C. App. 619, 684 S.E.2d 709 (2009). In that case, the plaintiffs sought to challenge, by declaratory judgment, Buncombe County's sale of a lot on property thatwhich had been dedicated for public use. The defendant, Black Dog Realty, moved to dismiss the complaint for lack of standing, which the trial court denied. On appeal, we examined the issue of standing. We noted that the plaintiffs failed to show standing in their pleadings. However, we were presented with a quandary: Black Dog Realty had filed a counterclaim to quiet title, which raised the identical legal issues. We resolved this dilemma by treating the plaintiffs' complaint and Black Dog Realty's counterclaim as a claim to quiet title and held that the trial court did not err in denying the motion to dismiss for lack of standing.

However, *Metcalf* is inapposite to the present case. In *Metcalf*, we specifically held that the plaintiffs failed to show standing. The only reason their claim was permitted to proceed was the counterclaim filed by the defendant raised identical legal issues. In the instant case, as in

Metcalf, plaintiff has failed to show standing. However, here, there is no counterclaim keeping plaintiff's complaint alive.

Further, aside from acknowledging their role in funding the erection of the statue over a century ago, plaintiffs alleged no ownership rights to the statue. Every case and statute cited by plaintiffs stands for the principle that, when a city or county acts in the manner described in plaintiff's complaint, *the owner of affected property* has rights that are implicated. Plaintiff has failed to demonstrate or allege any legal interest in the statue.

"In ruling on the motion [to dismiss] the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citation omitted), *disapproved on other grounds in Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1987). What matters here, and what was relevant to the trial court's consideration, was one question: Whether plaintiff, in its complaint, alleged standing. Viewing the allegations in plaintiff's complaint as true, we hold that the complaint fails to allege an actual ownership right or legal interest in the statue. Notwithstanding plaintiff's contentions on appeal as to what defendants did or the implications thereof, nowhere in plaintiff's complaint was a legal interest alleged. This is the first element of standing, and it is key: A plaintiff must allege an "injury in fact." *See Neuse River Found., Inc.*, 155 N.C. App. at 114, 574 S.E.2d at 51–52. Plaintiff failed to do so.

The dissent cites to several statutes including our General Statutes, Chapter 100 ("Monuments, Memorials and Parks"), as well as 18 U.S.C. § 1369 ("Destruction of veterans' memorials") and 36 CFR § 60.15 ("Removing properties from the national register"). We note that with the exception of N.C. Gen. Stat. § 100-2.1 (which was presented and considered in regard to plaintiff's standing argument), these authorities and arguments were not presented before this Court on appeal. Further, the dissent also cites to biblical passages that were not a part of the record nor presented to this Court on appeal. "It is not the role of the appellate courts, however, to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam).

Accordingly, we hold that the trial court did not err by granting defendants' Rule 12(b)(6) motions to dismiss plaintiff's complaint for lack of standing.

AFFIRMED.

Judge ARROWOOD concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The majority's opinion erroneously affirms the trial court's order granting Defendants' Rule 12(b)(1) and (6) motions to dismiss and holds the United Daughters of the Confederacy, North Carolina Division, Inc. ("the Daughters") do not possess standing and their complaint fails for lack of subject matter jurisdiction. N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2019). The majority's opinion then presumes jurisdiction and standing, yet dismisses the Daughters' complaint with prejudice for failure to state a claim upon which relief can be granted. N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2019).

Reviewing the allegations in the light most favorable to Plaintiff and taking the Daughters' assertions as true, their complaint properly asserts standing, invokes the superior court's jurisdiction, and states a claim upon which relief can be granted to survive Defendants' Rule 12(b)(1) and (6) motions to dismiss. I also write separately to address the pre-emptive and unlawful actions of the City of Winston-Salem. I vote to reverse the order to dismiss and remand. I respectfully dissent.

I. Background

The Daughters is an active entity in good standing chartered by the North Carolina Secretary of State as a North Carolina non-profit corporation on 16 September 1992. The Daughters qualified as a 26 U.S.C. § 501(c)(3) (2018) non-profit entity by the United States Department of the Treasury, Internal Revenue Service. The Daughters' stated purpose in its charter is for "historical, benevolent, memorial, educational and patriotic programs, plan events and scholarships[.]"

In 1905, the Daughters and members of its James B. Gordon Chapter solicited and raised contributions, paid for, and erected a granite statue of an unidentified, common, and representative soldier and veteran as a memorial and war grave to Forsyth County soldiers killed and not returned home and veterans wounded and dead in the Civil War, mounted on an inscribed stone base ("Memorial"). The Forsyth County Board of Commissioners by order dated 20 March 1905 accepted the

Memorial to be prominently placed on the grounds of the then Forsyth County Courthouse ("Courthouse property"). The Lieutenant Governor of North Carolina, Francis D. Winston, attended and addressed the dedication ceremony and presented the Memorial on behalf of the Daughters, followed by a reception with over 600 individuals in attendance.

The Courthouse property ceased to be used as the Forsyth County Courthouse in 1974. It housed Forsyth County offices for the next thirty years until 2004 when a new county office building was erected. The former Forsyth County Courthouse, including the grounds and all improvements thereon, including the Memorial, was nominated by the county and state to be placed and listed on the National Registry of Historic Places in 2012.

The application and nomination for the National Registry of Historic Places describes the Memorial as a "contributing" factor to the historical significance of the historic property to be qualified and listed in the National Register and describes the Memorial as follows:

> This monument stands at the northwestern corner of the block and memorializes the Confederate dead from Forsyth County. Erected in 1905 by the James B. Gordon Chapter of the United Daughters of the Confederacy, the monument faces northwest. The monument is executed in granite and consists of a sculpture of a man in a Confederate uniform with a rifle on a stone pedestal. The tall pedestal is composed of a rusticated stepped base, a smooth block with the words 'Our Confederate Dead' in relief, and a short shaft with a smooth surface with an incised inscription with the date and organization that erected the statue. This is topped with a projecting section with a medallion on each side. Above this the shaft tapers terminating in a base that holds the statue of the Confederate soldier. The upper shaft has a bas relief shield on the front.

A. Reservation of the Memorial to Forsyth County

In 2014, the Courthouse property was conveyed by the Forsyth County Commission to Winston Courthouse, LLC, with exemption from the conveyance and the express reservation to Forsyth County of a plaque mounted inside the building, a buried time capsule, and "public monuments located outside of the building on the land" from the transfer. Winston Courthouse, LLC asserted in its pleadings: "The Deed did

not convey ownership of certain items of personal property, such as a time capsule located within the historic building . . . a plaque located on the Building, and any public monuments located on and about the property." Winston Courthouse, LLC, also alleged it did not know who owned the public monuments and the Memorial.

B. Order Appealed

After receipt of a thirty-day demand letter from the City of Winston-Salem to remove the Memorial, the Daughters filed and sought a declaratory judgment to determine the rights of the parties with respect to the Memorial. Contemporaneously, the Daughters also filed a motion for a temporary restraining order and preliminary injunction, to preserve *status quo* and prevent the alteration, removal or relocation of the Memorial pending the litigation. The trial court denied the motion for temporary restraining order to maintain *status quo*.

On 6 February 2019, the Daughters filed a verified amended complaint joining Winston Courthouse, LLC, as a defendant. The Daughters also filed a separate amended motion for preliminary injunction.

The City of Winston-Salem filed a motion to dismiss pursuant to North Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6) on 8 March 2019, alleging a lack of subject matter jurisdiction and asserting the Daughters' failure to state a claim. On 20 March 2019, the Daughters filed a second amended motion for preliminary injunction alleging the City of Winston-Salem had inexplicitly dismantled and removed the Memorial without agreement or consent. The Daughters' second amended motion sought an injunction to force the City of Winston-Salem to return the Memorial to Courthouse Square.

On 8 May 2019, the trial court entered an order on Defendants' motions to dismiss. The trial court found the Daughters did not claim ownership of the statute and in fact, never alleged any rights. The trial court concluded that the Daughters did not allege ownership or any "other legally enforceable right" to the Memorial sufficient to convey standing, and that the Daughters had failed to establish "that there [wa]s any injury in fact that [wa]s either concrete or particularized to this specific plaintiff."

The trial court erroneously concluded the Daughters lacked standing and granted Defendants' motions to dismiss pursuant to Rule 12(b)(1), for lack of *subject matter jurisdiction*. The trial court also erroneously granted Defendants' motions to dismiss for failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6) with prejudice.

II. Standard of Review

Our Supreme Court has held:

> For the purpose of a motion to dismiss, the allegations of the complaint are treated as true. A complaint is sufficient to withstand a motion to dismiss where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and where allegations contained therein are sufficient to give a defendant notice of the nature and basis of plaintiffs' claim so as to enable him to answer and prepare for trial.

Forbis v. Honeycutt, 301 N.C. 699, 701, 273 S.E.2d 240, 241 (1981) (internal citations omitted).

This Court has also stated: "[a] complaint should not be dismissed for failure to state a claim unless it *appears beyond doubt* that plaintiff could prove *no set* of facts in support of his claim which would entitle him to relief. In analyzing the sufficiency of the complaint, *the complaint must be liberally construed*." *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987) (internal citations omitted) (emphasis supplied).

III. Motion to Dismiss

The pleadings assert and the record raises factual disputes over who currently owns the Memorial. According to the City of Winston-Salem, the Memorial remains owned by the Daughters and its members. The City of Winston-Salem sent the Daughters a letter on 31 December 2018 demanding of them, as owners, to remove the Memorial within thirty (30) days by 31 January 2019.

The current owner of the underlying property, Winston Courthouse, LLC, disclaims any ownership to the Memorial and notes, as the trial court found, the Memorial was expressly excluded with reserved easements for access to and maintenance in and from its deed from Forsyth County to the property. Forsyth County alleges it owns the Memorial.

The majority's opinion affirms the trial court's erroneous Rule 12(b)(1) dismissal on subject matter jurisdiction for lack of standing, asserting the Daughters do not claim current ownership. The Daughters do not have to claim sole ownership to possess standing in this declaratory judgment action. The City of Winston-Salem repeatedly asserted the Daughters' ownership in its demands and in other communications Defendants sent to Plaintiffs, while the other Defendants assert varying or unknown ownership. Defendants are bound by their allegations.

"[T]he law does not permit parties to swap horses between courts to get a better mount[.]" *Balawejder v. Balawejder*, 216 N.C. App. 301, 307, 721 S.E.2d 679, 683 (2011). It does not appear "beyond doubt" the Daughters' complaint being "liberally construed" asserts "no set of facts" to support their claims. *Dixon*, 85 N.C. App. at 340, 354 S.E.2d at 758.

In addition, our General Statutes also mandate prior notice guidelines and procedures for unclaimed property to ascertain ownership and for the transfer of such property to the State. *See* N.C. Gen. Stat. §§ 116B-56 and 116B-59 (2019). Any unclaimed property, whose owner cannot be ascertained, escheats to the State. N.C. Gen. Stat. § 116B-2 (2019). If the Memorial is determined to be held or owned by the State, additional notice and proceedings must occur as described below.

IV. Standing

The trial court dismissed the Daughters' declaratory judgment action for lack of *subject matter* jurisdiction under Rule 12(b)(1) for lack of standing. In a declaratory judgment action concerning standing, our Supreme Court has held:

> [T]he gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.

Goldston v. State, 361 N.C. 26, 30, 637 S.E.2d 876, 879 (2006) (citations, alternations, and internal quotation marks omitted).

Our Supreme Court further held:

> [A] declaratory judgment action must involve an actual controversy between the parties, plaintiffs are not required to allege or prove that a traditional cause of action exists against defendant[s] in order to establish an actual controversy. [A] declaratory judgment should issue (1) when [it] will serve a useful purpose in clarifying and settling the legal relations at issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding.

Id. at 33, 637 S.E.2d at 881 (alterations in original) (internal citations and quotation marks omitted). The Daughters' claims clearly assert and "involve an actual controversy between the parties." *Id.*

As an association of Chapters and members, the Daughters also possess representational standing for its Chapters and individual members if, "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990) (citation omitted); *see Fuller v. Easley*, 145 N.C. App. 391, 395-96, 553 S.E.2d 43, 46-47 (2001). ("[P]laintiff may have had standing to bring a taxpayer action, not as an individual taxpayer, but on behalf of a public agency or political subdivision, if the proper authorities neglected or refused to act. To establish standing to bring an action on behalf of public agencies and political divisions, a taxpayer must allege that he is a taxpayer of [that particular] public agency or political subdivision, . . . [and either,] (1) there has been a demand on and refusal by the proper authorities to institute proceedings for the protection of the interests of the political agency or political subdivision; or (2) a demand on such authorities would be useless.") (alterations in original) (internal citations and quotation marks omitted).

Here, members of the Daughters as citizens of Forsyth County also have standing as individuals to seek relief and for the Daughters to represent them. It is undisputed the Memorial was paid for and erected by the Daughters' members and Chapter, and it is directly related to the stated non-profit and charitable goals of the organization. The declaratory judgment claim asserted and the relief requested does not require the participation of the individual members or Chapters of the Daughters. *See River Birch Assocs.*, 326 N.C. at 130, 388 S.E.2d at 555. The trial court's order and dismissal for lack of standing and *subject matte*r jurisdiction under Rule 12(b)(1) is properly reversed and remanded. *See id.* The majority's opinion clearly bases its holding under Rule 12(b)(6), apparently recognizing the trial court's error under Rule 12(b)(1).

V. Memorial to Veterans

The Courthouse property, which includes the Memorial specifically commissioned, erected, and dedicated to dead and wounded Forsyth County veterans, was recommended for protection and preservation by Forsyth County and the North Carolina Department of Cultural and Natural resources for its historic significance and was accepted and listed on the National Register of Historic Places by the United States Park Service of the United States Department of the Interior on 23 April 2013. National Historic Preservation Act of 1966, as amended, 16 U.S.C.

470 *et seq.* (2018). *See* 54 U.S.C. 3021 (2018); 36 CFR § 60.3(f); 36 CFR § 60.15. The record is undisputed.

Under Federal law, the term "veteran" is defined to include persons who "served for ninety days or more in the active military or navel service during the Civil War." *See* 38 U.S.C. § 1532 (2018). The Congress of the United States also defines and grants the status and benefits of being an American "veteran" to any person "who served in the military or naval forces of the Confederate States of America during the Civil War[.]" 38 U.S.C. § 1501 (2018).

The Congress of the United States also instructed: "That the Secretary of the Army is authorized and directed to furnish, when requested, appropriate Government headstones or markers at the expense of the United States for the unmarked graves of the following[.]" The first category listed is "Soldiers of the Union and Confederate Armies of the Civil War." 24 U.S.C. § 279(a) (repealed 1 September 1973).

The Memorial was constructed and dedicated "to honor the men that fought and lost their lives" who were from Forsyth County. As a veteran's memorial and a war grave for those who did not return home and listed on the National Register, the Memorial is arguably protected from injury or destruction by the "Veterans' Memorial Preservation and Recognition Act of 2003." 18 U.S.C. § 1369 (2018) ("**Destruction of veterans' memorials** (a) Whoever . . . willfully injures or destroys, or attempts to injure or destroy, any structure, plaque, statute, or other monument on public property commemorating the service of any person or persons in the armed forces of the United States shall be fined under this title, imprisoned not more than 10 years, or both. . . . (b)(2) the structure, plaque, statue, or other monument described in subsection (a) is located on property owned by, or under the jurisdiction of, the Federal Government.").

VI. N.C. Gen. Stat. § 100-2.1

N.C. Gen. Stat. § 100-2.1, as amended in 2015, applies to and protects the Memorial. N.C. Gen. Stat. § 100-2.1 (2019). "[A]ny monument, memorial, or work of art owned by the State may not be removed, relocated, or altered in any way without the approval of the North Carolina Historical Commission." N.C. Gen. Stat. § 100-2.1(a). The statute protects monuments and memorials from being disturbed, removed, or relocated except in certain circumstances and are subject to certain exceptions. *Id.* The record is devoid of any "approval of the North

Carolina Historical Commission," prior to the City's dismantling and removal of the Memorial. *Id.*

As Plaintiff, the Daughters are seeking a declaratory judgment, restraining order, and injunction to enforce the statute, consistent with their threshold ownership of and role in securing and erecting the Memorial and the specific goals expressed in their charter. While the Daughters nor anyone else asserts the Memorial has escheated to the State of North Carolina, if the Memorial is determined to be owned by the State, by no one claiming ownership, or is located on State-owned property, additional restrictions and requirements must be satisfied *prior to* any efforts are commenced to alter or remove the Memorial. N.C. Gen. Stat. § 100-2.1.

VII. N.C. Gen. Stat. § 100-2.1(b)

N.C. Gen. Stat. § 100-2.1(b) provides the mandatory statutory mechanisms for the lawful alteration, removal or relocation of monuments and memorials. The City of Winston-Salem, any government or private entity, or any other person is mandated to comply with this and other statutes prior to any alteration or removal. N.C. Gen. Stat. § 100-2.1(b) additionally states: "As used in this section, the term 'object of remembrance' means a monument, memorial, plaque, statue, marker, or display of a permanent character that commemorates an event, a person, or military service that is part of North Carolina's history." This statute clearly applies to and protects the Memorial. Nothing in the record shows any compliance by the Defendants therewith.

A. Actions by the City of Winston-Salem

N.C. Gen. Stat. § 160A-193 (2019) grants statutory authority to a municipality to act when a building or structure constitutes an imminent danger to the public health or safety, creating an emergency necessitating the structure's immediate demolition. *See Monroe v. City of New Bern*, 158 N.C. App. 275, 580 S.E.2d 372 (2003). Before taking action, the municipality must comply with federal and state laws and give required notice, a hearing, and ample opportunity to make the structure safe. *Id.* at 278, 580 S.E.2d at 374.

The City of Winston-Salem, a political subdivision chartered by the General Assembly of North Carolina and which is located wholly within Forsyth County, would act *ultra vires* to purport to declare a Memorial and war grave dedicated to dead and wounded veterans of that county,

whether owned by Forsyth County or the Daughters or the State to be a public nuisance.

The Memorial was erected by county order, dedicated and maintained on reserved property easements to the county. The City of Winston-Salem has no lawful basis to declare the Memorial to be a public nuisance or to pre-emptively demand and then unilaterally remove it from a property listed on the National Register of Historic Places without prior permission or agreement. The City of Winston-Salem can only act to seek removal of the Monument after compliance with the applicable federal and state statutes. 18 U.S.C. § 1369 (2018); 36 CFR § 60.15; N.C. Gen. Stat. § 100-2.1(b).

Such unilateral and pre-emptive action is unlawful under these laws and statutes and is not allowed within N.C. Gen. Stat. § 160A-193(a) ("A city shall have authority to summarily remove, abate, or remedy everything in the city limits or within one mile thereof, that is dangerous or prejudicial to the public health or public safety."). The Daughters' declaratory judgment complaint invokes subject matter jurisdiction and states standing and claims for relief to survive Defendants' motions to dismiss.

B. Compliance with the Statutes

While the laws and statutes limit the authority of the City of Winston-Salem, Forsyth County, or anyone else to alter, remove or relocate the monuments or Memorial, the North Carolina statute does not totally prohibit removal or relocation. After compliance with federal and state requirements, the Memorial may be relocated to a "site of similar prominence, honor, visibility, availability and access that are within the boundaries of the jurisdiction from which it was located." N.C. Gen. Stat. § 100-2.1(b).

Since the dedicated location of the Memorial was erected by order of the County Commission near the front door of one of the County's most prominent building for over 115 years, and the only former public building in Forsyth County listed on the National Register of Historic Places, any substituted location in equal prominence may be a difficult standard to meet, although the statute requires the memorial to be of "similar prominence" and not "the same prominence." In any event, the statutory restrictions on relocation make removal of the Memorial not an option without prior "approval of the North Carolina Historical Commission," or an express agreement with the owner, which is the subject of the declaratory judgment action. N.C. Gen. Stat. § 100- 2.1(a)(b).

VIII. No Agreement to Relocate

The City of Winston-Salem inexplicitly and unlawfully sought to declare the Memorial to dead and wounded veterans from Forsyth County to be a public nuisance, used taxpayer funds to dismantle and remove the Memorial, and sought to relocate the Memorial to the Salem Cemetery without the agreement of the owners and in violation of federal and state law. On 31 December 2018, City of Winston-Salem Mayor Joines wrote to the Daughters and purported to demand the Daughters to remove the Memorial within thirty days, no later than 31 January 2019. The Memorial had remained in place and undisturbed since 20 March 1905 until April 2019.

There is no allegation or agreement with any purported owner to remove or relocate the Memorial or any showing of prior compliance with the federal and state statutes. Temporary removal is permitted by agreement with the owner when required to preserve the Memorial, which must be re-erected within ninety (90) days thereafter. N.C. Gen. Stat. § 100-2.1(b). Defendants make no allegations of actions or threats of action to physically damage the Memorial, so that provision would not appear to apply. *Id.*

The statutes provide one exception, presuming the Memorial is owned by the Daughters or other private owners that may be applicable, which provides that an object of remembrance owned by a private party that is located on public property may be removed, if it is subject to a legal agreement governing its removal or relocation. Defendants do not assert any agreement with the Daughters, Forsyth County, the State, or any other potential owner to dismantle, remove, or relocate the Memorial. *Id.* Defendant Winston Courthouse, LLC specifically disclaims any ownership of the Memorial.

Prior to the Memorial being unlawfully dismantled and removed, only two instances of the Memorial being spray painted had occurred and that desecration was immediately removed and cleaned. There was no evidence of violence or other direct substantiated threats to public safety from the 115-year-old Memorial to permit the City of Winston-Salem to act unilaterally to remove the Memorial.

IX. Conclusion

The superior court clearly possesses jurisdiction and Daughters possess standing on multiple grounds to assert the declaratory judgment action and claims to survive dismissal under Rule 12(b)(1). N.C.

Gen. Stat. §§ 1-277; 7A-27 (2019); *see Goldston*, 361 N.C. at 30, 637 S.E.2d at 879. The Daughters possess the individual standing of its members and Chapters and representational standing to seek a declaratory judgment and other relief. *River Birch Assocs.*, 326 N.C. at 130, 388 S.E.2d at 555. The trial court's order of dismissal "with prejudice" to the contrary is clearly erroneous.

When the complaint is "liberally construed" it does not appear "beyond doubt" the Daughters' complaint asserts "no set of facts" to support their claims and entitlement to relief. *See Dixon*, 85 N.C. App. at 340, 354 S.E.2d at 758. The Daughters' allegations clearly assert an "injury in fact" from Defendants' actions. *See Neuse River Found., Inc.*, 155 N.C. App. at 114, 574 S.E.2d at 51-52. The trial court granting of either of Defendants' Rule 12(b)(1) or 12(b)(6) motions with prejudice was error. "Thou shalt not remove thy neighbour's landmark, which they of old time have set[.]" *Deuteronomy* 19:14 (King James). "Remove not the ancient landmark, which thy fathers have set." *Proverbs* 22:28 (King James).

The majority's opinion does not address, explain, distinguish nor refute any of the rules, precedents, laws, and statutes that are plead at the trial court, cited on appeal, and as controlling law, are clearly applicable to the facts and record that is before us. The order of dismissal with prejudice is erroneous and is properly reversed and remanded. I respectfully dissent.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 DECEMBER 2020)

ANGEL v. SANDOVAL No. 20-236	Surry (14CVD335)	Affirmed
CHARZAN v. N.C. DEP'T OF PUB. SAFETY No. 20-97	N.C. Industrial Commission (TA-24298)	Dismissed
ELITE GUARD, INC. v. VETERANS ALT., INC. No. 19-1154	Cumberland (18CVS7460)	Affirmed
EMBERY v. GOODYEAR TIRE & RUBBER CO. No. 19-782	N.C. Industrial Commission (16-038373)	Affirmed
IN RE A.H. No. 19-1115	Orange (17JA36-37)	Vacated and Remanded
IN RE A.O. No. 20-175	Mecklenburg (13JA441) (13JA443)	Affirmed
IN RE J.B. No. 20-25	McDowell (19JA27) (19JA28)	Affirmed in part and Remanded in part
IN RE K.A.W. No. 20-99	Gaston (18JA208) (18JA209)	Affirmed
SCHWARZ v. WEBER No. 19-1164	Mecklenburg (18CVS4097)	Affirmed
STATE v. ABDULLAH No. 19-867	Wake (17CRS211984)	No plain error
STATE v. ALLEN No. 19-1004	Cleveland (19CRS000988) (19CRS050406)	New Trial
STATE v. BELL No. 19-1147	Brunswick (17CRS55091) (18CRS2146-47) (19CRS819)	No Error.
STATE v. BULLOCK No. 20-187	Onslow (18CRS51429)	Reversed

STATE v. CAMPBELL No. 19-1035	Granville (15CRS50053-55) (15CRS50059-60)	No Error
STATE v. EDWARDS No. 19-505	McDowell (12CRS52005) (12CRS52016)	NO ERROR; REMANDED TO CORRECT TYPOGRAPHICAL ERROR.
STATE v. FOSTER No. 19-891	Rockingham (18CRS50950) (18CRS924)	Dismissed
STATE v. GILMORE No. 20-288	Cumberland (18CRS53917)	No error in part, vacated in part.
STATE v. GONZALEZ No. 19-192	Johnston (16CRS57241)	No Error
STATE v. GRIMES No. 20-244	Bertie (18CRS50453-55) (18CRS50457)	No Error; Remand for Correction of Clerical Errors
STATE v. HARRIS No. 19-1156	Pitt (16CRS50571)	No Error
STATE v. HIGGINS No. 20-133	Mecklenburg (18CRS238246-47)	No Error
STATE v. HOLDEN No. 19-830	Wake (14CRS208087) (14CRS208088) (14CRS2275)	Remanded for rehearing.
STATE v. KORSCHUN No. 20-81	Wayne (17CRS53453)	No Error
STATE v. MILLS No. 20-84	McDowell (18CRS569-570)	No error in part; Remanded in part
STATE v. NEAL No. 20-134	Wake (16CRS219065) (16CRS219207) (16CRS4952) (16CRS5069)	No Error
STATE v. PEAY No. 19-698	Forsyth (18CRS50965-67) (18CRS586-87)	Affirmed in part; No error in part.

STATE v. RICE No. 19-1105	Robeson (10CRS54101-04)	No Error
STATE v. SHARMA No. 19-591	Wake (17CRS215065-66) (17CRS218038-39)	Affirmed in part; dismissed in part; no error in part.
STATE v. SLADE No. 19-969	Guilford (15CRS93186-88) (19CRS25103-07)	Affirmed in Part, Reversed in Part and Remanded
STATE v. STEVENSON No. 19-1096	Union (17CRS50549) (18CRS731)	NO ERROR IN PART; VACATED AND REMANDED IN PART.
STATE v. THOMAS No. 19-361	Forsyth (17CRS50492) (17CRS50494-96)	No Error
STATE v. WOODY No. 20-195	Burke (16CRS53902)	NO ERROR IN PART; VACATED IN PART; REMANDED IN PART

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